

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF: \***  
**MONTGOMERY GENERAL HOSPITAL, INC. \***

Petitioner \*

Harold Pickett \*

Paul Piazza \*

Edward Wallington \*

Craig Hedberg \*

For the Petitioner \*

Jody S. Kline, Esquire \*

Soo Lee-Cho, Esquire \*

Attorney for the Petitioner \*

\*\*\*\*\*

Walter M. Lee, individually and on behalf \*

of the Champlain Homeowners Assoc. \*

Opposed to the Petition \*

\*\*\*\*\*

Martin Klauber, Esquire, People's Counsel \*

In Support of the Petition \*

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner

Board of Appeals Case Nos. CBA-2521-I  
(OZAH Case No. 07-21)

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## **I. STATEMENT OF THE CASE**

### **A. Procedural Background**

On February 16, 2007, Petitioner Montgomery General Hospital, Inc., filed a petition seeking to modify an existing Special Exception (CBA-2521-H, and earlier grants) to permit a variety of improvements, including additions, renovations and upgrades to facilities and the addition of up to 14 employees. Montgomery General Hospital (MGH) is located at 18101 Prince Phillip Drive, Olney, Maryland, in the RE-2, R-200 and R-60 Zones. Its property consists of 44.59 acres of land identified on the plat records as Parcels N-122, N-900, N-933 (Part of Parcel-A), N-961, P-120, P-207, P-209, and Lots 3 through 5; Block B “Timberland Estates.” Montgomery General operates under numerous special exceptions and modifications,<sup>1</sup> the most recent being CBA 2521-H.

Initially, the hearing in this case was scheduled for June 29, 2007. It was postponed a couple of times at Petitioner’s request to give the State Highway Administration (SHA) time to review a traffic study (Exhibits 15 and 17). On June 8, 2007, the Office of Zoning and Administrative Hearings issued a notice for a public hearing to be held on October 19, 2007 (Exhibit 18). Petitioner moved to amend the petition on August 9 and 13, 2007 (Exhibits 19 and 20), and on October 1, 2007 (Exhibit 23). Those motions were duly noticed (Exhibits 21 and 24), and approved without opposition.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) issued its Report on September 21, 2007 (Exhibit 22), recommending approval, with conditions.<sup>2</sup> On October 4, 2007, the Montgomery County Planning Board voted unanimously to recommend approval of the special exception, with conditions, as stated in the October 9 letter of its chairman (Exhibit 28).

On October 9, 2007, Walter M. Lee filed a letter stating that he would appear at the hearing on

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<sup>1</sup> CBA-2521; CBA-2521A-H; S-640; S-343; S-327; CBA-2979; BAS-511; BAS-1920; BAS-1921. According to Technical Staff, major hospital expansions (building and acreage) took place in the mid 90s and the early part of 2000.

<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

behalf of the Champlain Homeowners Association (Exhibit 25). Mr. Lee stated in a subsequent e-mail that the homeowners association (HOA) was “supportive” of the petition, but there were questions about noise due to helicopter traffic that he would raise at the hearing (Exhibit 27). He subsequently characterized this concern as an “objection.” Exhibit 29.

A public hearing was convened as scheduled on October 19, 2007, and testimony was presented by Petitioner in support of the petition. Martin Klauber, People’s Counsel for Montgomery County, participated in the hearing and expressed his conditional support for the petition. Walter M. Lee testified on his own behalf and on behalf of the Champlain Homeowners Association. He stated that the HOA opposed the petition as long as MGH had a heliport, although individually he was more flexible on the subject, if MGH complied with regulations and provided certain information. The record was held open until November 6, 2007, for additional filings by Petitioner and responses thereto.

On November 5, 2007, the Hearing Examiner held a conference call/meeting with all parties of record to discuss questions relating to the proposed helipad relocation. As a result, the record was held open, initially until November 7, and then until November 16, 2007 (Exhibits 49 and 53). Both sides filed supplemental materials regarding this issue (Exhibits 50, 51 and 52).

On November 13, 2007, prior to the record closing, the Council enacted changes to its Growth Policy (Exhibit 62) which, *inter alia*, modified Local Area Transportation Review (LATR) and added a new form of Policy Area Transportation Review known as Policy Area Mobility Review (PAMR). In order to give the parties and Technical Staff an opportunity to comment on the impact, if any, of these changes upon the subject case, the Hearing Examiner e-mailed Technical Staff and all parties of record on November 15, 2007, giving them the opportunity to address this issue (Exhibit 54). Responses were filed by People’s Counsel (Exhibit 55), Petitioner (Exhibit 56) and Technical Staff (Exhibit 57).

To further complicate this matter, on December 11, 2007, the Council President introduced a

Zoning Text Amendment (ZTA 07-17) proposing, *inter alia*, that the Board of Appeals be required to apply the Growth Policy in effect when the special exception application was filed (Exhibit 61). A public hearing on this proposal is scheduled for January 29, 2008. The record was reopened to receive these materials and closed again on December 12, 2007 (Exhibit 63). The question of whether to apply the new Growth Policy to this case will be discussed in Part II.C.4, at pp. 28-34 of this report.

### **B. Scope of the Hearing**

Zoning Code §59-G-1.3(c)(4) provides that the public hearing on modification applications must be limited to discussion of those aspects of the special exception use that are directly related to the proposed modifications, and if the total floor area will be expanded by more than 25% or 7,500 square feet, the Board may review “the underlying special exception,” but only to a limited extent, as specified in Zoning Ordinance §59-G-1.3(c)(4)(A). That section provides:

(A) *After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.* [Emphasis added.]

In the subject case, the planned expansion to the hospital floor space will total 82,250 square feet, according to Petitioner’s Statement of Operations (Exhibit 3(a)). Therefore, the Board may require that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if it finds that the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding

neighborhood could reasonably be expected.

As will appear more fully below, the Hearing Examiner finds that the proposed modifications would not change the nature or character of the special exception, nor are the proposed changes so extensive as to create substantial adverse effects on the surrounding neighborhood.

## **II. FACTUAL BACKGROUND**

### **A. Subject Property and Current Use**

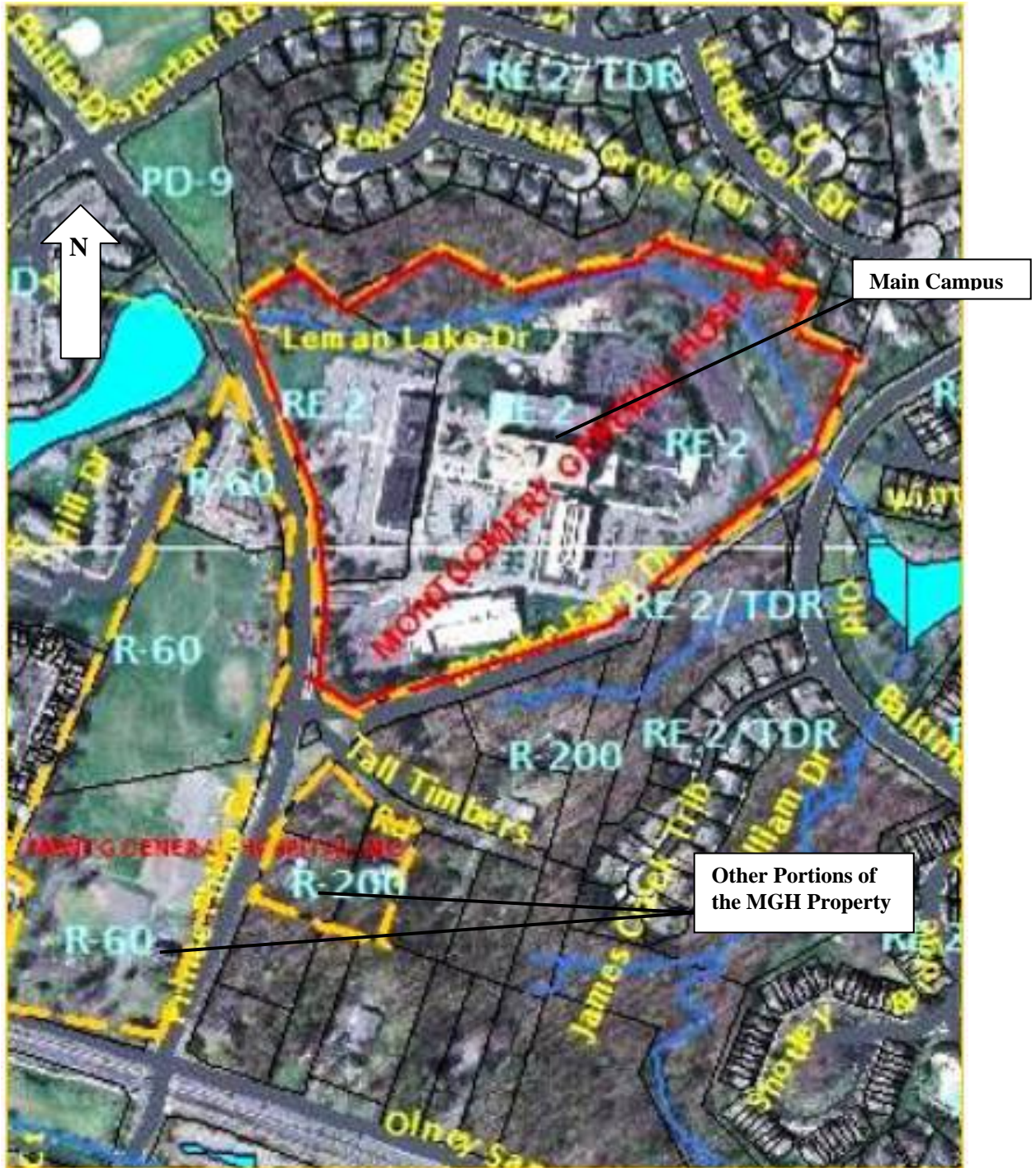
Montgomery General Hospital, Inc. operates pursuant to Special Exception CBA-2521, with modifications A through H. The overall Hospital property consists of approximately 44.59 acres, but the proposed modifications are limited to the 27 acre main campus (*i.e.*, the special exception site). It is improved with the main hospital building, several other professional and medical office buildings, a three-level parking garage and surface parking lots.

The main campus of MGH, which is zoned RE-2, is located on Prince Phillip Drive at its intersection with Brooke Farm Drive, and its entrance is approximately 1,200 feet north of its intersection with Olney-Sandy Spring Road (Route 108). MGH has been at the same location since the 1969. According to Technical Staff, the northernmost portion of the special exception site lies within a stream valley buffer. The main campus, as seen from the west, is shown on an aerial photo from page 4 of the Technical Staff report (Exhibit 22):



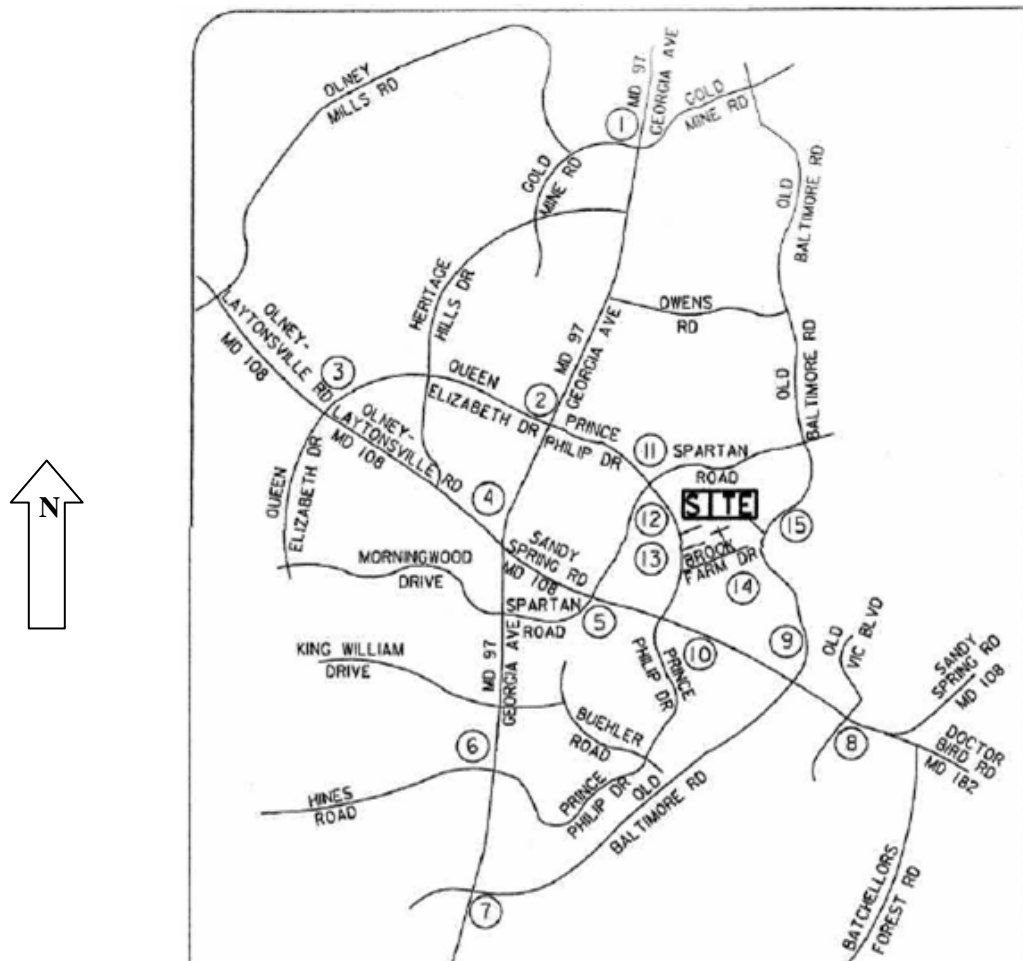


The entire property (on both sides of Prince Phillip Drive), is shown with dashed lines on the following photo from page 5 of the Technical Staff report:



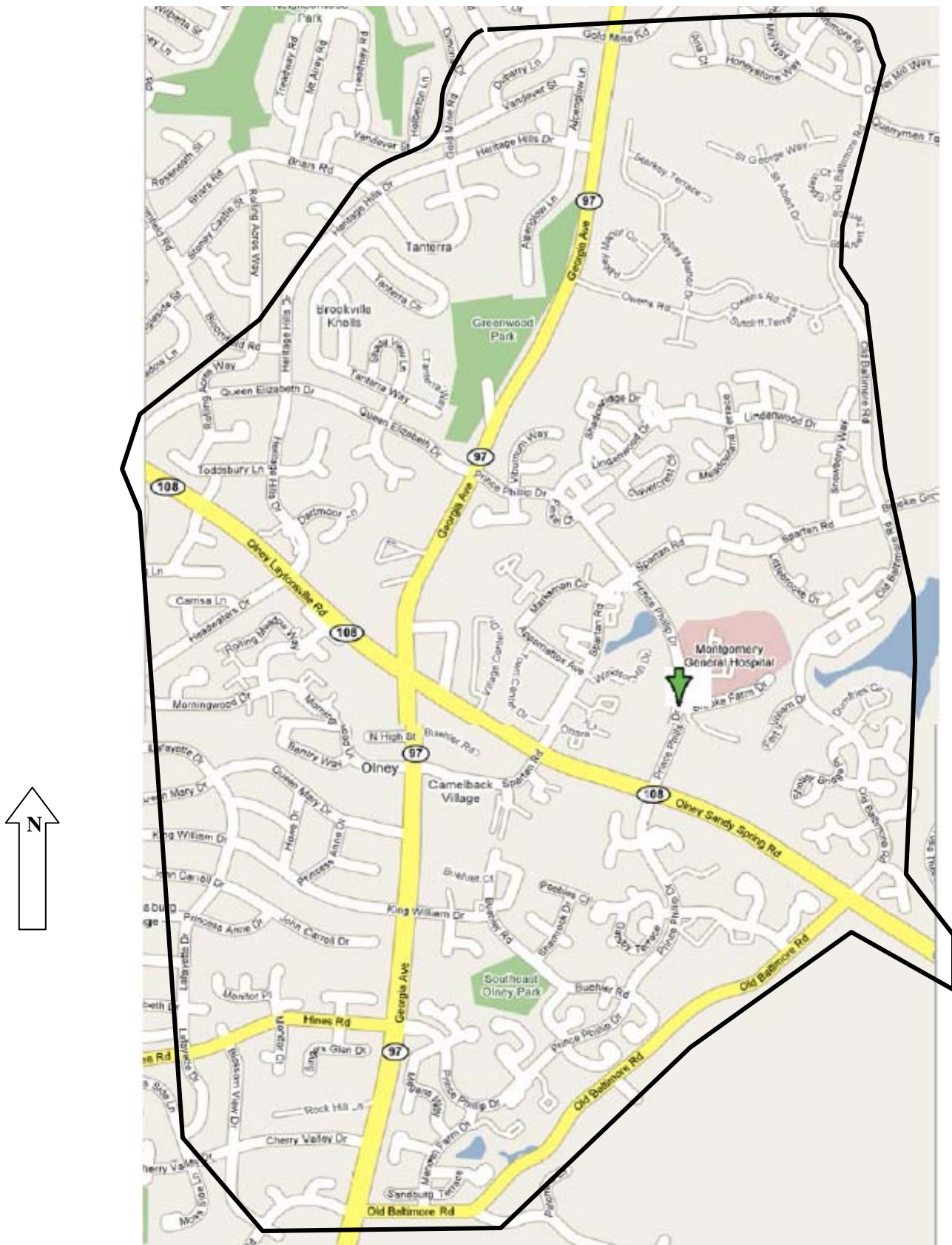
### B. The Neighborhood

The neighborhood was defined by Technical Staff (Exhibit 22, p. 5) as bordered by Spartan Road to the west and north, Olney-Sandy Spring Road and Brooke Farm Drive to the south, and Old Baltimore Road to the east. The Hearing Examiner feels that, given the size and intensity of the use, the general neighborhood should be larger than Technical Staff's proposed definition. MGH traffic will undoubtedly affect travelers far outside the borders of Technical Staff's defined neighborhood, as evidenced by Petitioner's traffic study (Exhibit 19(a)). Since the main impact of the proposed modification upon the neighbors will relate to traffic, it makes sense to define the neighborhood's borders by reference to the intersections which will be affected by the expansion and are therefore included in Petitioner's traffic study. *See* Appendix E to the Traffic Study (Exhibit 19(a)). Those intersections are depicted in the following diagram from the Traffic Study (p. 6):





The general neighborhood, as defined by the Hearing Examiner, is shown on the following Google Map (Exhibit 35):



The neighborhood is generally bordered by Old Baltimore Road on the east and south, segments of Lafayette Drive, Queen Elizabeth Drive, Heritage Hills Drive and Gold Mine Road on the west, and Gold Mine Road on the north. There are slight bulges to take in the intersections of Olney-Laytonsville Road/Queen Elizabeth Road on the west and Olney-Laytonsville Road/Old Vic Boulevard on the east, both of which are just beyond the edge of the map. Thus, the general neighborhood includes all the intersections likely to be significantly impacted by the proposed modification.<sup>3</sup> The neighborhood also bulges to the east of Old Baltimore Road to include those residences to the east and southeast of MGH which are in view of the hospital grounds, and may be affected not only by traffic but by the added bulk of the hospital and by noise and/or vibrations from helicopters.

The neighborhood, according to Technical Staff, is predominantly residential, with a few institutional uses. The Brooke Grove Elementary School is located northeast of the subject hospital in the RE-2/TDR Zone. To the north of the hospital are single-family houses in the RE-2/TDR zone. Southeast of the special exception site are single family houses in the RE-2/TDR zone and largely unimproved parcels of land in the R-200 Zone. The area farther south, across MD 108, is developed with a church in the R-90 Zone, and a mixture of townhouses and single-family dwellings in the R-90

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<sup>3</sup> Petitioner's counsel felt that the Hearing Examiner's neighborhood definition was "broader but for traffic than would need to be." Tr. 14. People's Counsel, Martin Klauber, initially opined that since both issues (traffic and visual impacts) had to be analyzed, it made little difference whether one looked at the issue as an expanded neighborhood. Tr. 15-16. Subsequently, however, he objected to the enlarged neighborhood definition (Tr. 147-149), arguing that general neighborhood should apply only to land use factors such as height and bulk, not to traffic impacts, which are analyzed separately. Petitioner's traffic engineer (Craig Hedberg) agreed with Mr. Klauber, noting that the size of the traffic study area was determined by all hospital generated trips, not by just by those which will be generated by the additions. Tr. 141-145. However, in response to the Hearing Examiner's questions, Mr. Hedberg admitted that his traffic study revealed traffic impacts from the proposed additions at both the farthest intersection studied to the north (Georgia Avenue and Gold Mine Road) and the farthest intersection studied to the south (Georgia Avenue and Baltimore Road). Tr. 145-146. Given these facts, in a case where the only significant impact from the modification will be from increased traffic, the Hearing Examiner concluded that it makes sense to view the neighborhood in terms of the traffic impact area, in addition to the visual impact area. As redefined, the neighborhood stretches about 1.5 miles to the north and south and about 1.2 miles to the west. The eastern boundary remains, for the most part, near Old Baltimore Road, although it bulges a bit to the east and southeast. Even without considering the traffic impacts, Technical Staff's defined neighborhood was too small because it did not include residential areas south of Brook Farm Drive that are directly across the street from the hospital's main campus, and those to the east and southeast that can see the hospital campus across Old Baltimore Road.

TDR and RE-2/TDR zones. West of the subject site are multi-family developments in the PD-9 Zone. Ex. 22, p. 5. Further west is the Olney Town Center, with retail and commercial establishments.

This description was fleshed out at the hearing by one of Petitioner's witnesses, Edward Wallington, an engineer who participated in the development of the surrounding area. Tr. 77-82. To the north is the James Creek development. Spartan Road is a significant road that runs east and west through that community, and the homes are typically residential cul-de-sacs. These homes are predominantly single-family, separated from the hospital by a fairly substantial stream valley buffer. Further to the northeast is an existing school site, which is accessed from Spartan Road and Baltimore Road. Beyond that are another stream valley buffer and more residential communities.

Hallowell is a large residential subdivision to the east of the campus. It is a mix of single-family detached homes and townhouses. The units closer to the hospital tend to be more detached units. The ones near the Hallowell Pond, which are shown on the map (Exhibit 32), are townhouses. There is a cul-de-sac directly southeast of the hospital, which has detached homes. The area between that cul-de-sac and the hospital is a wooded stream valley buffer.

To the west are a couple of different features. There is a large, open field that's currently controlled by Montgomery General Hospital, and there is an existing use across Prince Philip Drive, immediately to the west of the hospital, which is known as Winter Growth, an adult daycare facility. Beyond that is a regional pond that serves as storm management control for the Olney Town Center, and then there are some existing residential uses, mostly attached units. Mr. Lee lives in that community. Further west, the entire area just to the east of Georgia Avenue is generally known as the Olney Town Center. It is fairly heavily developed with retail and commercial uses, some strip shopping centers. Those retail and commercial uses to the west also extend just to the west of Georgia Avenue and south of Route 108 (Olney Sandy Spring Road).



South of the hospital are lower density residential uses, partly in Hallowell. Further to the south are the early phases of Hallowell, which are residential for about a mile south of Route 108, all the way to Georgia Avenue. There are also some churches, and a mix of uses, within the residential theme.

These features can be seen on the aerial photograph (Exhibit 32) presented at the hearing:



### C. Proposed Modification

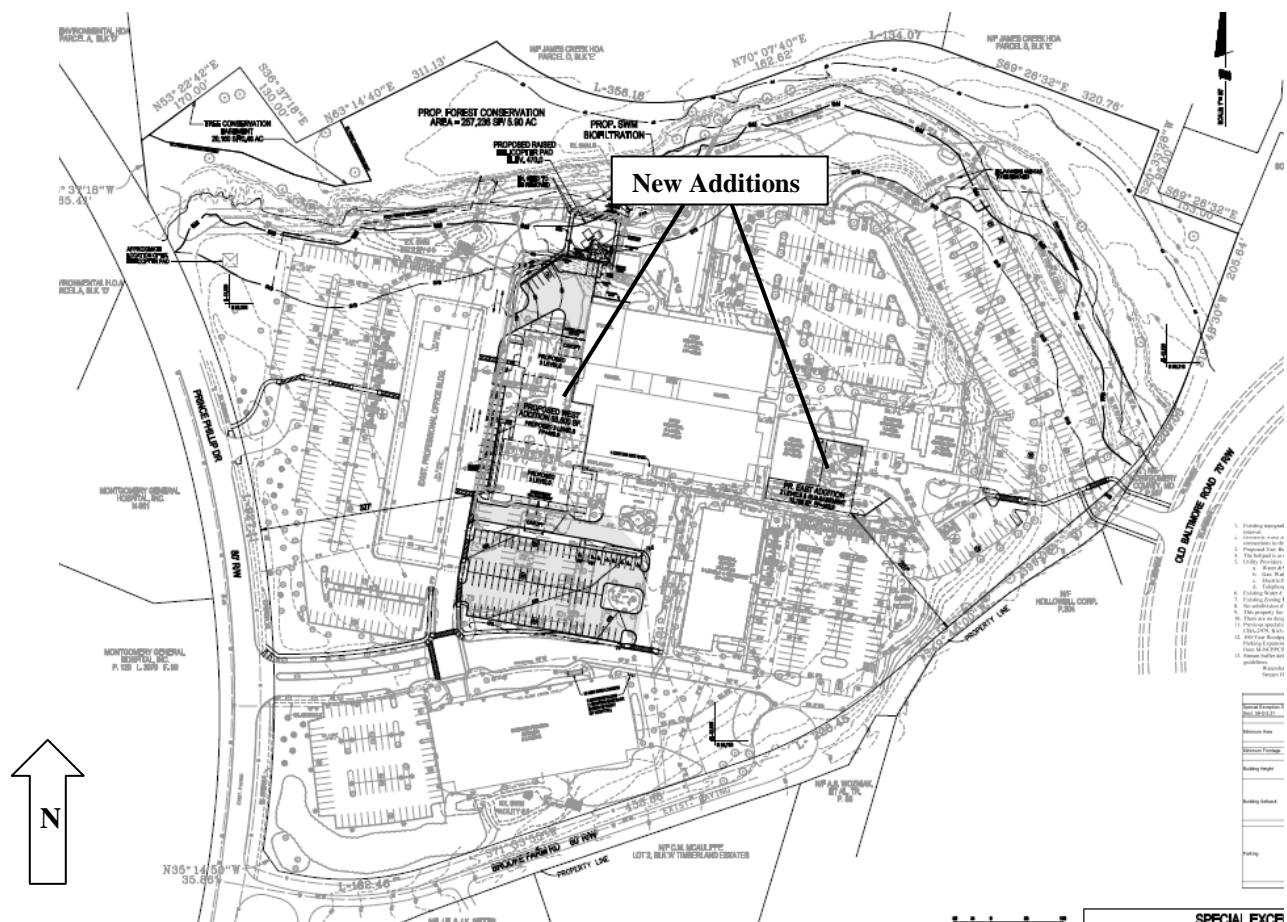
The Hospital desires to modify its special exception in order to permit improvements to the existing main hospital building and parking, located on the Main Campus (north of Brooke Farm Drive and east of Prince Philip Drive). According to Petitioner’s Statement of Operations (Exhibit 3(a), p. 5), “The proposed modifications will enable Montgomery General Hospital to provide the

expanded emergency services, improved patient accommodations, and more convenient outpatient services necessary to meet current demand, coupled with greater attention to patients' privacy."

The proposed modifications are as follows (Exhibit 22, p. 4):

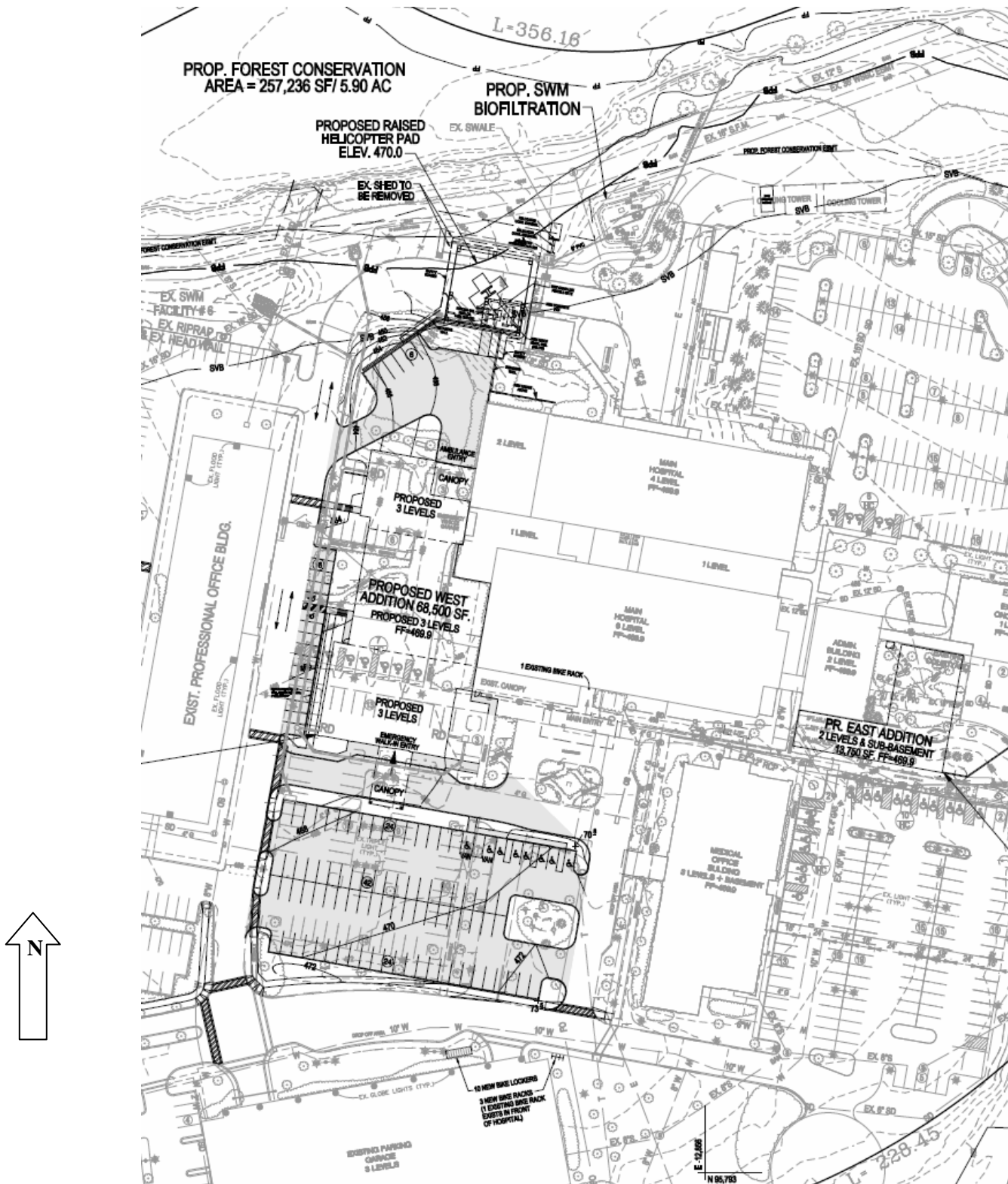
1. A three-story, 68,500 square-foot addition to the west end of the existing hospital building.
2. Installation of a new elevator which will connect to all six floors of the hospital.
3. A two-level, plus basement, 13,750-square-foot addition to the east end of the existing hospital building.
4. Relocation of the helipad to a new structure.
5. An increase by 12 spaces to the existing surface parking.
6. Conversion of 31,000 square feet of office space in the existing hospital building into private rooms.
7. Addition of up to 14 new employees, with staggered work hours.

All of the proposed expansion to floor space will take place in two additions, one on the west side of the existing hospital building and one on the east side, as shown in the revised Site Plan- (Exhibit 45(c)), reproduced below and on the following pages:





In order to better show detail, the enlarged central portion of the campus is shown below, followed by the General Notes and Development Standards Table from Exhibit 45(c):





**GENERAL NOTES:**

1. Existing topography by LSA and others, boundary prepared by LSA: 2' contour interval.
2. Domestic water, sewer, fire protection and electrical service will be supplied by connections to the existing public lines within Prince Philip Drive.
3. Proposed Use: Hospital expansion and relocation of helipad.
4. The helipad is an elevated structure.
5. Utility Providers:
  - a. Water & Sewer: WSSC
  - b. Gas: Washington Gas Light Co.
  - c. Electric: PEPCO
  - d. Telephone: Verizon
6. Existing Water & Sewer Service Categories: W1/S1
7. Existing Zoning: RE-2, R-200 and R-60
8. No subdivision of this property is proposed.
9. This property lies within the Olney Master Plan
10. There are no designated historic sites associated with this property.
11. Previous special exception cases: S-640, S-343, S-327, CBA-2521, CBA-2521 A-H, CBA-2979, BAS-511, BAS-1920, BAS-1921, BAS-3278.
12. 100-Year floodplain delineations shown hereon are from Site Grading Plan for Parking Expansion, Hospital Expansion Phase II, by PRC Toups dated 2/12/79 and from M-NCPPC floodplain mapping for James Creek Tributary J-5, Sheet J5-1.
13. Stream buffer delineations shown hereon are in accordance with current M-NCPPC guidelines.
 

Watershed: James Creek/Hawlings River/Patuxent River  
Stream Class: IV/IV-p

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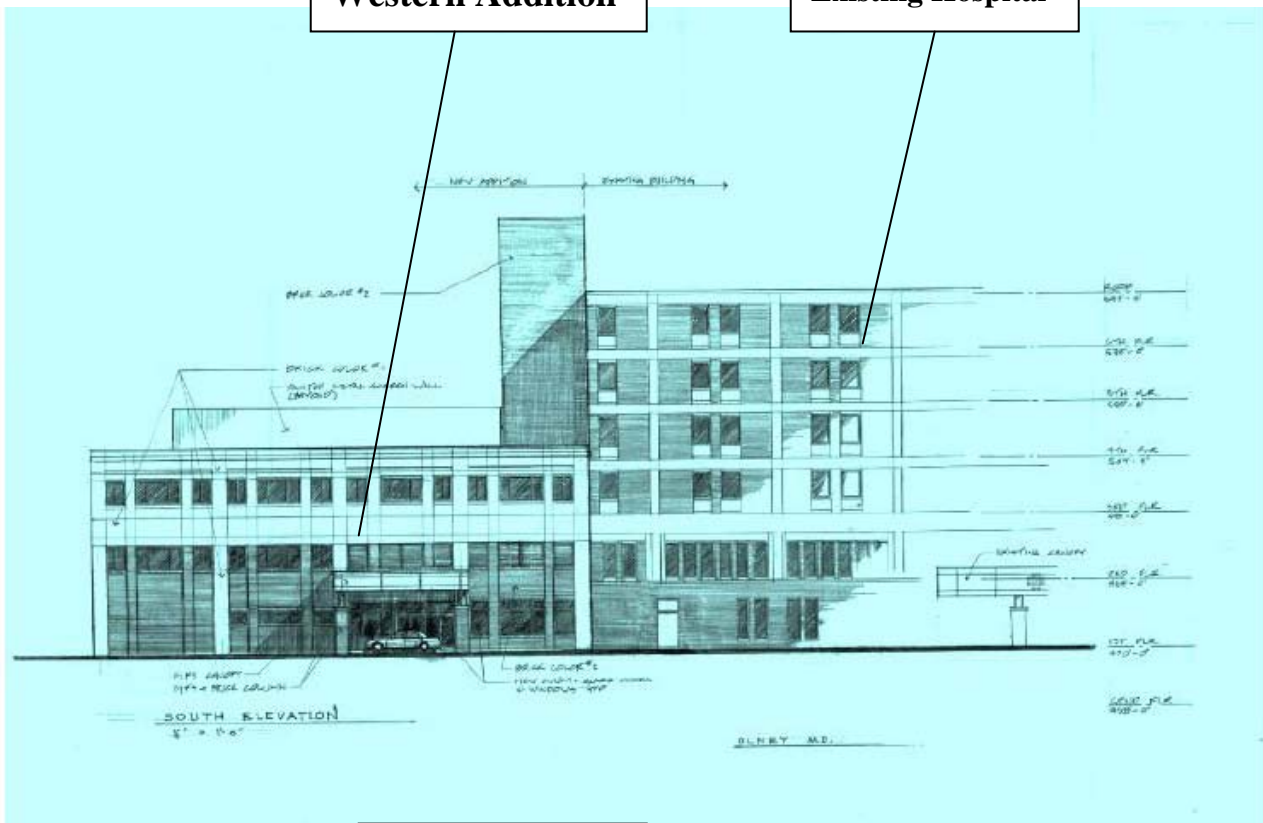
DEVELOPMENT STANDARDS		
Special Exception Standards - Sect. 59-G-2.31	Required/Allowed	Provided
Minimum Area	5 Acres	Main Campus: 27.19 ac. Other campus parcels: 17.40 ac. Total Provided: 44.59 ac
Minimum Frontage	200'	927.10'
Building Height	145' Maximum	Eastern addition: 25' 6" Western addition: 42' 0" (73' to top of elevator cores)
Building Setback	No closer to a lot line than a distance equal to the building height when adjacent to land which is in a single family zone or use and in all other cases no less than 50' from a lot line.	Eastern addition: 207' Western addition: 327'
Parking	1 space/1,000 sq. ft. floor area = 514,650 sq. ft./1,000 = 515 spaces 1 space/resident physician (15 ea.) = 15 spaces Adequate reserved space for visiting physicians (17 ea.) = 17 1 space/3 employees on major shift = 450 employees/3 = 150 spaces Total spaces required = 697 spaces	Existing = 1,169 spaces Net gain with this expansion = 12 spaces 1,181 spaces

At the hearing, Applicant provided architect's perspectives of the proposed new buildings (Exhibits 38 and 39). Following each, various elevations of the proposed buildings are shown:



**Western Addition**

**Existing Hospital**



**WESTERN ADDITION**

**South Elevation**



### North Elevation – Showing Helipad in Front





Petitioner's Statement of Operation (Exhibit 3(a)), provides the following detail regarding the proposed modifications:

- 1) A three (3) story addition to the existing hospital building creating 68,500 new square feet of building area on a 22,850 SF footprint.

A three story addition will be constructed at the western end of the existing main Hospital building. (It will be structurally designed to accept three additional floors in the future). The first floor of this three-story addition will house Emergency Department (ED) activities. Outpatient services and a dining

hall will be located on the second floor. The third floor will not be finished off until a use is assigned to the space.

a) Emergency Department: The proposed addition will allow the Hospital to address currently over-crowded emergency department conditions by expanding Emergency Department capacity from approximately 35,000 visits annually to 60,000 visits annually. The Hospital has found that existing volumes in its Emergency Department, combined with the mix of patients who present for treatment, have led to significant wait times and unacceptable frequency and duration of ambulance diversions. Furthermore, the population within the Hospital's service area is expected to grow, and the average age is expected to increase. It has been found that hospital use rates among aging populations are higher than younger populations. All of these factors are expected to increase volumes in the ED, and a modern, more efficient Emergency Department is needed to serve this increased volume of patients.

The proposed modifications will also enable the creation of an observation unit where patients can be monitored in order to determine whether admission is medically necessary. In addition, this larger Emergency Department facility will enable the hospital to better comply with patient privacy regulations that are often difficult to enforce given current crowded ED conditions.

b) Outpatient Services: The proposed three-story addition will also allow the relocation of Outpatient Services to a location that will be much more convenient for patients. Outpatient Services are currently located at the rear of the main hospital building, requiring a lengthy walk from parking facilities to the hospital building and then through the hospital to the farthest point at the rear. Relocating these facilities to the front of the building on the second floor of the new addition will mean patients will only need to travel a short distance from parking to appointments.

c) Dining Hall: The relocated Outpatient Services will be placed in a combination of renovated space in the existing Hospital and newly built space in the three story addition. This relocation of Outpatient Services will displace the dining hall. The newly improved dining hall, that caters to visitors, employees, physicians and non-hospital employees who work in the Hospital's Professional Office Buildings, will be located on the second floor of the new addition.

2) A new elevator to be installed in the addition will connect to all six floors of the Hospital "tower".

[Although only three levels of the west addition are being built at this point, the six-story elevator will enable patients to be easily transported from the ED to any of the inpatient units, particularly critical care and the addiction and mental health unit on the 6th floor of the hospital. Tr. 30-31]

- 3) A two-level addition to be added to the east end of the existing hospital building totaling 13,750 square feet on a 6,850 square foot base.

This new Hospital wing will house administrative support services and the Infusion Center.

a) Administrative Support Services: Currently, administrative support services are located in the main Hospital building, but will be moved to the new east wing in order to permit conversion of Hospital offices to patient rooms, as described below.

b) Infusion Center: At the Infusion Center, patients can receive outpatient chemotherapy, or infusions such as blood or hydration when ordered by their physician. The current Infusion Center is located on the fourth floor of the main hospital building (often called the “tower”), but will be moved to the ground floor of the new east addition. These facilities will move for two primary reasons. First, the current location (within an inpatient area) is not conducive to the constant flow of outpatients. Second, the space that the Infusion Center currently occupies is needed to enable MGH to convert almost the entire fourth floor of the bed tower to private rooms. If the Infusion Center were to remain on the fourth floor, MGH would not be able to convert as many patient rooms to private use. The proposed new location is optimal as it joins a growing "cluster" of oncology related services. MGH's goal is to have all outpatient, oncology-related diagnostic and treatment services located on one part of the campus, in close proximity to each other.

- 4) Relocation of the helipad to a structure north of the new west addition at the same level as the Emergency Department floor.

Currently, a remote helipad requires a lengthy travel across parking lots to transport patients between the helipad and the Emergency Department. The proposed relocation of the helipad will allow immediate access to the Emergency Department, thereby permitting injured or sick patients to be transferred from the helicopter to the emergency room much more quickly.

- 5) An increase of [twelve (12)] spaces<sup>4</sup> of additional surface parking, and improved circulation for ambulances.

The Hospital currently has a physician parking lot that will be impacted by the construction of the new ED. Some existing parking spaces will be removed as a result of the construction of the new addition, while others will be added,

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<sup>4</sup> This was initially listed as 56 additional parking spaces, but it was reduced to 12 additional spaces after Technical Staff review.



resulting in a net gain of 12 parking spaces. Some of the spaces will be designated for physician parking. The balance of spaces will be used to provide proximate ED parking. At present, the ambulance bays for the Emergency Department are immediately adjacent to the pedestrian entrance of the ED and across from the entry to the Professional Office Building. This can cause significant congestion. The proposed modifications will bring the ambulance bays to the rear of the ED, while the pedestrian entrance will be located at the front of the building. This revised placement will decrease congestion for ambulance traffic coming in to and out of the Hospital's Emergency Department.

6) Renovation of approximately 31,000 square feet of existing hospital space.

The proposed renovation of existing hospital space will allow the Hospital to meet increasing patient demand for private rather than semi-private rooms by converting administrative offices currently located in the hospital tower to single rooms for patients. It will also result in improved dining facilities and more proximate Outpatient Services, as described above.

7) Operational Information:

The modifications proposed will not increase the number of patient beds in the Hospital. Although there will be an increase in Emergency Department staff of 7 - 8 nurses, 2 - 3 additional nursing technicians, and 2 - 3 clerical personnel, the staggering of work hours over each 24 hour period will mean that [initially] only one or two additional employees will be present at any one time. [Eventually, as ED visits increase, additional staff may increase to four or five present at any given time.]<sup>5</sup>

Harold M. Pickett, MGH's Vice President of Facilities Management, testified that there were five primary objectives of the proposed expansion project: to increase the emergency services capacity and throughput, which is at capacity now, in order to decrease the wait times of emergency room patients from several hours to a much more acceptable period of time; to convert the hospital's inpatient units beds to all private rooms in order to increase the safety and comfort level and the experience for the patients and their families;<sup>6</sup> to relocate outpatient services more to the front of the hospital where they're more accessible and closer to parking; and to provide the necessary parking; and

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<sup>5</sup> The bracketed words in this paragraph were added by the Hearing Examiner to reflect the testimony of Harold M. Pickett, MGH's Vice President of Facilities Management. Tr. 46-48.

<sup>6</sup> All of the rooms in the hospital except for two on one unit will be private rooms.

to retain some flexibility for future growth on the site, conserving as much land as possible and building as close as possible to the existing building. Tr. 21-23.

Paul Piazza, the senior project manager for this expansion, testified that the direction and the philosophy that was taken in the design of this project was to maintain the campus environment, which is a combination of light-colored and brown-colored brick and a lighter colored synthetic plaster material. That theme was maintained in both planned additions, as shown in the perspectives introduced as Exhibits 38 and 39, and reproduced on pages 16 and 18 of this report. Also, using a series of broken surfaces of brick and synthetic plaster, Petitioner will be able to reduce the overall massing of the six-story tower onto the main entrance of the campus. According to Mr. Piazza, the residential touch is maintained with soft colored bricks and the lighter colored accents, which do not follow any of the modern architectural features of administrative facilities – no large expanses of glass, no atriums, a very low profile, low-key building. Tr. 119-120.

According to Petitioner's civil engineer, Ed Wallington, the closest house in James Creek (*i.e.*, to the north) is approximately 550-600 feet away from the proposed west addition; it is about 600 feet to the closest one to the west; 1,000 feet to the closest buildings to the east; and approximately 600 feet to the south. From the proposed east addition, the distance to the nearest northern residence is about 550 feet; to the east, also 550 feet; to the south, about 500 feet; and to the west, about 1000 feet. Tr. 92-95

Mr. Wallington noted that the view of the hospital will change to a degree because there are new elements being constructed. However, the existing hospital is a six-story high building, and the planned expansion is only three stories (although the new elevator shaft will extend to all hospital floors). So the visual impact will not be that of a much larger, taller building with much larger mass.

It would be a natural add-on to what is there. Tr. 80. The existing building will probably screen much of the view of the new buildings from the residential areas. Tr. 89-91.

2. Staff and Hours of Operation:

According to Mr. Pickett's testimony, the hospital operates 24 hours a day, 7 days a week, and employs about 1200 people, with 500 being on the heaviest shift. Tr. 48. Mr. Pickett supplemented his testimony, at the request of the Hearing Examiner, with a "Description of Typical Daily Activity" at MGH (Exhibit 47(a)):

During any 24-hour weekday period, the following are the approximate activity levels on the Montgomery General Hospital campus:

1. 650 employees on 3 shifts (350 on day shift); 90% driver personal vehicles (585);
2. 40 Volunteers;
3. 30 physicians visit the Hospital;
4. 270 physicians and staff visit the 2 Medical Office Buildings (including 90 physicians);
5. 540 patients visit the 2 Medical Office Buildings;
6. 26 emergency vehicles visit the campus;
7. 66 Metro and Ride-On buses visit the campus;
8. 550 visitors come to the Hospital;
9. 365 patients visit for inpatient admission, out-patient and Emergency Services;
10. 50 deliveries are made.

The approximate total campus visits per 24-hour period is 2,522. The current Emergency Services visits are approximately 98 per day or 3.9% of estimated daily campus visits.

The estimate of Emergency Services visits projected to occur by 2015 is 50,000 on an annual basis or 137 per day (5.3%). (The Hospital seeks approval for

an Emergency Department that will accommodate up to 60,000 visits per year – 164 per day – but that level of use will not be reached until a date beyond MGH's planning horizon.)

The Emergency Services volumes represent 24% of daily Hospital patient volumes. 74% of patient visits are out-patient and 2% are admissions. These percentages are expected to hold when the Emergency Services volumes reach 50,000 visits per year and beyond.

The Petitioner indicated that the proposed modification will not result in an increase in the number of patient beds in the hospital because the intent is to increase the number of private rooms. Therefore, no additional inpatient staff is anticipated. The modification, however, results in an increase in the number of Emergency Department staff by a maximum of 14 new employees. At the hearing, Petitioner's Vice President of Facilities Management, Harold M. Pickett, explained that the increase in ED staff up to 14 will occur over a five or six year period. Initially, there would be only one or two extra per shift, but ultimately that would increase to four or five per shift. Tr. 46-48. Mr. Pickett anticipates some, but not a significant increase in non-ED outpatients, and the main reason for the relocation of non-ED outpatient services was to remedy the inconvenience to impaired patients caused by the current location.

### 3. Transportation and Parking:

Petitioner's transportation planner, Craig Hedberg, did a local area transportation review (LATR) assessing the impact of the proposed improvements on the community. His findings were summarized in his Traffic Study (Exhibit 19(a)), and discussed in his testimony (Tr. 136-154). The proposed changes will generate about 108 new trips in the a.m. peak hour and 93 in the p.m. peak hour (Exhibit 19(a), p. 15, Table E). These figures are based on the floor space being added that will generate new trips, not on new staff being added. Some new floor space, such as the expanded dining room and converting double rooms into single rooms, will not generate new trips.

Technical Staff determines the LATR study area (*i.e.*, how many intersections out from the hospital must be evaluated) by considering all the trips that are generated by a site, not just those resulting from the expansion. In this case, the expansion, itself, will only going generate about 108 trips; however, when combined with existing trip generation [of 637 a.m. peak-hour trips], Technical Staff required that 11 off-site and 4 on-site driveway intersections be studied.

Mr. Hedberg indicated that he followed the full procedures outlined in the local area review guidelines, and he found that only one of the studied intersections, Georgia Avenue and westbound Old Baltimore Road during the a.m. peak hour, failed to operate within the adopted congestion standard for Olney, a critical lane volume (CLV) of 1475 in the Olney Policy Area at the time the study was done.<sup>7</sup> During the a.m. peak hour, that intersection has a CLV of 1531, prior to the proposed modification (*i.e.*, under the background traffic conditions, which includes existing conditions plus projects already in the pipeline). Exhibit 19(a), p. 14, Table C. Adding the traffic from the expansion, the critical lane volume goes to 1,535. Exhibit 19(a), p. 20, Table F.

To offset the impact of site traffic at that intersection, Petitioner proposes to construct a third, right-turn, westbound lane on Old Baltimore Road approaching Georgia Avenue. Mr. Hedberg pointed out that this intersection improvement was identified in the Olney Master Plan [p. 103]<sup>8</sup> as a potential improvement that could be considered to address congestion situations. With the construction of that improvement, the total traffic conditions would be reduced below the background conditions, thus providing the mitigation that is required under the local area review guidelines. In

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<sup>7</sup> On November 13, 2007, after the hearing in this case but while the record was still open, the Council adopted Resolution 16-376, which made revisions to the Council's Growth Policy. These revision, *inter alia*, reduced the congestion standard in the Olney Policy Area to 1450. This specific change does not affect transportation analysis in this case, because the one offending intersection will continue to exceed even the higher previous congestion standard, but any increases from the subject petition will be mitigated consistent with the LATR. The other intersections are all in compliance with both standards. However, other changes to the Growth Policy, if applied here, might have some impact on this case, as will be discussed below.

<sup>8</sup> Mr. Hedberg testified that he thought the reference was at page 99 of the Master Plan, but it actually is at page 103.

other words, by adding the extra lane, CLV drops down to 1,530, bringing the intersection under the congestion level which existed under background conditions. Exhibit 19(a), p. 21, Table G.

According to Mr. Hedberg, both the state highway administration and Technical Staff reviewed and approved his report. Technical Staff agreed with Mr. Hedberg's conclusions, stating that it had reviewed the traffic study and that "it complied with the requirements of the Local Area Transportation Review (LATR) Guidelines and the traffic study scope provided by staff." Exhibit 22, p. 9.

Transportation Planning Staff recommended conditions which have been incorporated into Part V of this report:

- Petitioner must limit expansion related to this special exception modification request at the hospital to no more than 82,250 square feet of additional gross floor area.
- Petitioner must obtain permits from appropriate agencies and post bond to improve the westbound Old Baltimore Road approach to Georgia Avenue (MD 97) by providing a separate right turn lane prior to the release of any building permit for the expansion.
- Petitioner must provide the following lead-in sidewalks from Prince Philip Drive and Old Baltimore Road to the various hospital buildings:
  - From Prince Philip Drive:
    - i. Along the north side of the main hospital driveway connecting to the existing Medical and Professional Office Buildings and the proposed new west addition.
    - ii. Along the north side of the northern hospital driveway connecting to the existing connecting walkway through the parking lot in front of the existing Professional Office Building.
  - From Old Baltimore Road:
    - i. Along the hospital driveway connecting to the existing sidewalk along the east side parking lot (in front of the existing Oncology Building).

The above sidewalks must be shown on the approved special exception site plan and must be constructed prior to occupancy of the proposed additions.



- Petitioner must provide a minimum of ten (10) bike lockers for employees and four (4) bike racks for visitors at the hospital. The bike lockers and bike racks must be shown on the approved special exception site plan and must be constructed prior to occupancy of the proposed additions.

In addition to access by car, there are seven buses that serve the subject site, five Metro buses and two Ride-on buses, and the buses actually come from Prince Philip Drive into the subject site, so there is excellent public transportation available for employees and visitors. In Mr. Hedberg's opinion, the proposed use will be served by adequate public transportation facilities, and the internal circulation system will be safe, adequate and efficient. One major proposed improvement is the separation of the emergency vehicles from the visitors and potential patients to the emergency room, which will certainly be a much more efficient and safer situation. Tr. 140.

There are currently a total of 1,169 parking spaces on site, and the subject proposal would add 12 new spaces. As noted above, Petitioner initially intended to add 56 additional parking spaces, but it was reduced to 12 additional spaces after Technical Staff review. Edward Wallington, Petitioner's civil engineer, testified that the original application proposed new parking along the existing service drive in the area of the proposed helipad, but the environmental planning staff of Park and Planning, although supporting the new helipad location, were not in favor of adding new parking spaces for environmental reasons. That accounts for the difference between the 12 new spaces in the final plans and the 56 originally proposed. The reduction of new parking spaces is a function of environmental concerns and does not relate to the circulation of the ambulances, which will be improved in the new plans. Tr. 86-89. As demonstrated by Petitioner's revised Site Plan (Exhibit 45(c)), and confirmed in the Technical Staff report (Exhibit 22, p. 17), only 697 spaces are required by the Zoning Ordinance, so Petitioner's proposed 1,181 spaces more than meets that requirement.

#### 4. The Growth Policy Issue:

As mentioned at the beginning of this report, the Council amended the County's Growth Policy while this case was pending (Exhibit 62). In order to give the parties of record an opportunity to comment on the impact of those changes upon this case, the Hearing Examiner e-mailed all parties on November 15, 2007, and reopened the record to receive comments from Technical Staff and all parties. The Hearing Examiner's email (Exhibit 54) outlined the issues as follows:

The Council voted on November 13, 2007 to change the part of the Annual Growth Policy (AGP) pertaining to transportation. Among other things, it modified LATR and added a new form of Policy Area Transportation Review known as Policy Area Mobility Review (PAMR). My understanding is that these changes apply to all subdivision applications filed after January 1, 2007, and not yet acted upon (The subject application was filed February 16, 2007). Even though we have already gone through the hearing, under Maryland law, the current Zoning laws are applied at the time the reviewing body acts unless the statute specifies otherwise.

Although Montgomery General (MGH) is not applying for a subdivision, Zoning Ordinance §59-G-1.21(a)(9) expressly requires the Board of Appeals to make findings regarding LATR and PATR in special exception applications when there will be no subdivision. I am therefore writing to invite the parties to comment as to what impact these changes to the AGP have upon the pending review of the above-referenced application. The record closes tomorrow, but I will extend it again if any party needs more time to answer.

My preliminary review of the amendments reveals that both the LATR changes and the new PAMR requirements may have some impact here. The new LATR standards lowered the congestion threshold for Olney intersections to 1450 (from 1475). There remains only one problematic intersection, Georgia Avenue and Old Baltimore Road. The proposed mitigation measures at this intersection will not reduce the critical lane volume (CLV) of 1535 down to the congestion standard (or the previous standard), but it previously passed LATR because the mitigation would reduce the CLV to 1530, which is below the background level of 1531. Exhibit 19(a).

The problem is that another LATR change by the Council requires that where the mitigation cannot reduce the intersection to the congestion standard CLV level, the Applicant's mitigation must reduce the number of trips so that 150% of the CLV impact attributable to the changed development will be eliminated. Here the changes to MGH would increase the CLV at this intersection by 4 critical lane movements (1531 to 1535) before any mitigation. 150% of that CLV increase would be 6 critical lane movements. So, under the new standard, it appears that the mitigation required would be 6 critical lane movements, bringing the CLV down to 1529, not the 1530 level promised by Petitioner.

PAMR also requires a 25% trip mitigation in the Olney area under some circumstances. I am not sure how that would apply here, but various avenues are offered in the legislation to achieve the mitigation.

The People's Counsel responded first, with a suggestion that Technical Staff submit a supplemental report followed by a comment period and possibly a further hearing (Exhibit 55). Petitioner filed a legal analysis on November 21, 2007, arguing that the new Growth Policy did not apply (Exhibit 56). The opposition did not respond. On December 3, 2007, Technical Staff responded with an e-mail indicating that "the status of the Montgomery General Hospital case with respect to the new AGP policies is undecided at this time and it could take a few weeks to resolve." (Exhibit 57).

The Hearing Examiner again e-mailed all parties of record on December 3, 2007, to ask how they wished to proceed, either to await Technical Staff's further analysis and comments by the parties or to close the record after receiving the most recent exchanges and file the Hearing Examiner's report (Exhibit 58). The People's Counsel took no position (Exhibit 59), and the opposition did not respond. By letter dated December 4, 2007, Petitioner requested that the record be closed immediately and that the Hearing Examiner's report be filed (Exhibit 60).

On December 11, 2007, the Council President introduced a Zoning Text Amendment (ZTA 07-17) proposing, *inter alia*, that the Board of Appeals be required to apply the Growth Policy in effect when the special exception application was filed (Exhibit 61). The Council unanimously voted to schedule the public hearing on this proposal for January 29, 2008. Given the long delay that would be inherent in waiting for the Council's action on the proposed ZTA, and the fact that Petitioner wants the record closed and no party has objected thereto, the Hearing Examiner decided that the fairest path to follow was to close the record (Exhibit 63) and issue his report with analysis and a recommendation to the Board of Appeals regarding the applicability of the new Growth Policy.

That analysis begins with Petitioner's November 21, 2007 letter (Exhibit 56) arguing against applicability of the new Growth Policy. Petitioner concedes that changes to zoning laws have

retrospective application to pending cases under the doctrine set forth in *Yorkdale Corporation v. Powell*, 237 Md. 121, 205 A.2d 269 (1964). However, Petitioner argues that under the case of *Layton v. Howard County Board of Appeals*, 399 Md. 36, 922 A.2d 576 (2007), the retrospective application applies only to changes in zoning laws, while other statutory changes require prospective application. Petitioner asserts that the Growth Policy is not a zoning ordinance, and therefore changes in it should be governed by general rules requiring prospective application of statutes.

The Hearing Examiner concludes that the case law does not establish the bright line that Petitioner sees. The ruling in *Layton* regarding retrospective application of statutory changes was not restricted solely to changes in zoning laws. Rather, the Court held that “changes to statutes that impact land use issues made during the course of litigation in land use and zoning cases” must be given retrospective effect. 399 Md. at 51, 922 A.2d at 585. In fact, the Court in *Layton* was interpreting the impact upon a special exception application of a change in the definitional section of an animal control law, not a zoning law.<sup>9</sup> That change occurred during the court review process, after the Howard County Board of Appeals had partially denied the special exception based on the animal control law as it had existed at the time it was before the Board. The very first sentence of the Court’s opinion makes it clear that the issue under review was broader than Petitioner has described it:

This case, in a land use or zoning context, addresses the question of the retrospective applicability of a related statutory law which is amended during the course of litigation.

The respondents in *Layton* attempted to restrict the scope of the court’s ruling to changes in zoning laws, but the court rejected that restriction, 399 Md. at 70, 922 A.2d at 596:

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<sup>9</sup> Under the new law, as described by §§ 17.300(g) and 17.307(d) of the Howard County Code, the special exception applicant might arguably have met the definition of an “Animal Sanctuary” and thus be exempt from the prohibition against keeping wild or exotic animals under § 17.307(d)(5).

Respondents also argue that the law in question, §§ 17.300(g) and 17.307(d) of the Howard County Code, is not part of Howard County's zoning ordinance or regulation, but part of the Howard County Animal Control Law. The zoning law, however, impliedly incorporates those relevant provisions of the Animal Control Law. The Animal Control Law was applied by the Board in making its land use determination as to whether Frisky's was entitled to a special exception under the zoning ordinance. It was applied in a land use context. Therefore, it was a determinative provision in a zoning context, and we will apply it retrospectively under *Yorkdale*. On remand, the Board shall apply the current law. [Footnote omitted.]

For the aforementioned reasons, we reaffirm the *Yorkdale* rule that a substantive change in relevant statutory law that takes place during the course of the litigation of a land use or zoning issue shall be retrospectively applied by appellate courts.

The court noted “When . . . an ancillary statute becomes a part of the resolution of a land use issue, such as present here, *Yorkdale* may apply.” 399 Md. at 70, 922 A.2d at 596, n. 28.

Applying this law to the subject case results in an even murkier scenario because it is unclear whether the new Growth Policy, which is technically not a statute, would be considered sufficiently analogous to the animal control law in *Layton* to make its holding applicable here. The Hearing Examiner concludes that it is analogous because it is expressly incorporated into law through the special exception portion of the Zoning Ordinance, §59-G-1.21(a)(9)(i),<sup>10</sup> which provides, in relevant part:

*If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.* [Emphasis supplied]

As noted in *Layton*, the *Yorkdale* rule requiring retrospective application of a statutory change affecting land use does not apply when “the legislature shows a contrary intent.” 399 Md. at 54, 922

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<sup>10</sup> It is also applied by the Adequate Public Facilities Ordinance (APFO) §50-35(k).

A.2d at 587. Here, the Council's intent is unclear regarding how and when these Growth Policy changes should apply to special exceptions.

The Council's Resolution 16-376, adopted November 13, 2007, provided the following language regarding the effective date of its Growth Policy revisions:

**AP1            Effective dates**

*This resolution takes effect on November 15, 2007 and applies to any application for a preliminary plan of subdivision filed on or after that date. In accordance with County Code §50-35B, any preliminary plan of subdivision for which a completed application was filed on or after January 1, 2007 and which the Planning Board did not approve before November 13, 2007, is subject to this resolution.*

Petitioner argues that the first sentence should control because it states the Council's intent to, in general, give the Growth Policy prospective effect. The second sentence, Petitioner asserts, was intended as "a specific exception to the general prospective application of the Growth Policy" based on the Council's adoption on September 11, 2007 of Subdivision Regulation Amendment 07-03 (SRA 07-03), codified in County Code §50-35B (Ordinance No. 16-07), under which the Council specified that new Growth Policy provisions may be retrospectively applicable to certain subdivision applications filed after January 1, 2007.

To decide this issue, we must evaluate the Council's intent in framing the quoted provision governing effective dates. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

In this case, there is indisputably ambiguity in the Council's language, as the two sentences contained in the provision are seemingly self-contradictory. One says that the revised Growth Policy applies to subdivision applications filed after November 15, 2007, and the other says it applies to subdivision applications filed after January 1, 2007, if approval was not given by the Planning Board before November 13, 2007. Perhaps more importantly, the language does not tell us how and when to apply the new Growth Policy to special exception applications.

The legislative history of the revised Growth Policy does not appear to address the issue of special exceptions, and the provision cited by Petitioner, SRA 07-03, addresses only subdivisions. It provides, in part, that subdivision applications filed after January 1, 2007, may be subject to a later-revised Growth Policy. The Hearing Examiner suggests that reading the two legislative provisions together (*i.e.*, the Growth Policy effective date provision and SRA 07-03), one might reasonably conclude that the Council intended to apply the revised Growth Policy to pending special exceptions requiring subdivision, where the subdivision application has not yet been filed or was filed after January 1, 2007, and has not yet been approved by the Planning Board. Other special exception applications would be governed by the general rule, which would apply the revised Growth Policy only to those applications filed after November 15, 2007. The present modification petition will not require subdivision, so under this interpretation the new Growth Policy standards would not apply.

Alternatively, one could conclude that the January 1, 2007 effective date was intended to cover special exception application filing dates, in addition to subdivision application filing dates, making the new Growth Policy applicable to the subject application, which was filed in February 2007. However, even under that scenario, one could still decide that the Growth Policy amendments would not apply to this case because the Planning Board voted to recommend (albeit not grant) approval of the special exception on October 4, 2007 (Exhibit 28), which is prior to the November

13, 2007 cutoff.

On the other hand, one could conclude that the Council had no intent whatever with regard to special exceptions, because it may not have considered them when evaluating the revisions to the Growth Policy. In any event, the Council's intent is unclear, and the legislative history does not elucidate. There are also fairness and practical considerations in attempting to retroactively apply a revision to the Growth Policy to a special exception that has already gone through, not just the complete transportation analysis and Planning Board review, but also the full special exception hearing process.

Given these unusual circumstances in this case, and the fact that Technical Staff has not yet been able to decide whether it believes the new Growth Policy standards should apply to this case, the Hearing Examiner concludes that at least for this case, the new Growth Policy standards should not be applied. The Hearing Examiner hastens to add that this conclusion is not intended as a general one applying to all special exception cases. Rather, it is intended to address fairness and practical concerns inherent in this particular case that has already been fully heard. We are in a gray area here, and the Hearing Examiner believes that fairness considerations should predominate.<sup>11</sup> The Petitioner has clearly met its burden of demonstrating compliance with the Growth Policy standards in effect when this matter was reviewed.

5. Landscaping, Lighting and Signage:

Montgomery General Hospital already has significant landscaping. Additional landscaping will be added as the result of negotiations with Technical Staff, as well as removal of previously impervious surface areas, extensive planting, and an environmentally sensitive stormwater treatment (bio-filtration) facility. The landscaping can be well seen on Exhibit 31, the rendered Landscape

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<sup>11</sup> The Board, of course, has the option of deferring consideration of this petition until the District Council acts on ZTA 07-17; however, such a course would delay Montgomery General Hospital's ability to make needed modifications.



Plan:<sup>12</sup> The dark green on Exhibit 31 is generally representative of the landscaping that's at the site. The new landscaping is shown in a lighter green, primarily around the new parking lot.



<sup>12</sup> Since the landscape plans did not show all the shrubbery, the Hearing Examiner requested that Petitioner file a revised landscape plan detailing all landscaping existing and proposed for the site. Petitioner therefore filed a revised Landscape Plan (Exhibits 45(d) and (e)). They are the controlling landscape plans; however, the rendered plan (Exhibit 31) provides a clearer view, and is therefore reproduced above.

With regard to lighting, Zoning Ordinance §59-G-1.23(h) provides:

***Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Technical Staff found that “the proposed modification satisfies that requirement.” Exhibit 22, p. 20. The Hearing Examiner was not able to reach any conclusion in this regard based on the earlier filed photometric study, and therefore requested a revised study which Petitioner subsequently filed as Exhibit 45(f). That exhibit, reproduced below, shows compliance with the requirement:<sup>13</sup>



<sup>13</sup> In a couple of areas (southwest and southeast), the 0.1 foot candle line extends a bit outside the lot line, though not into the adjacent lots because of the intervening right-of-way. The Hearing Examiner considers these exceptions to be *de minimis*. Moreover, the exception on the southwestern side is actually at a front lot line, adjacent to Prince Phillip Drive, and therefore is not at issue. If the tiny southeast exception were still considered a violation of the ordinance, then the Hearing Examiner would recommend that the Board exercise the discretion granted by this provision and approve it “to improve public safety,” so that lighting will be adequate on the parking lot adjacent to the property line in question.

The final item in this section concerns signage. Since there are no new signs proposed in this modification petition, there are no issues in this regard. Exhibit 22, p. 18.

6. Environment and the Forest Conservation Plan:

Technical Staff reports (Exhibit 22, p.2) that the construction of the hospital and subsequent modifications predate the current environmental requirements restricting development within the stream valley buffer. As a result, certain hospital facilities are located within or in very close proximity to the stream valley buffer on the northernmost portion of the property. Therefore, the location of existing structures and facilities, to some extent, dictates the location and placement of the proposed improvements in the current application.

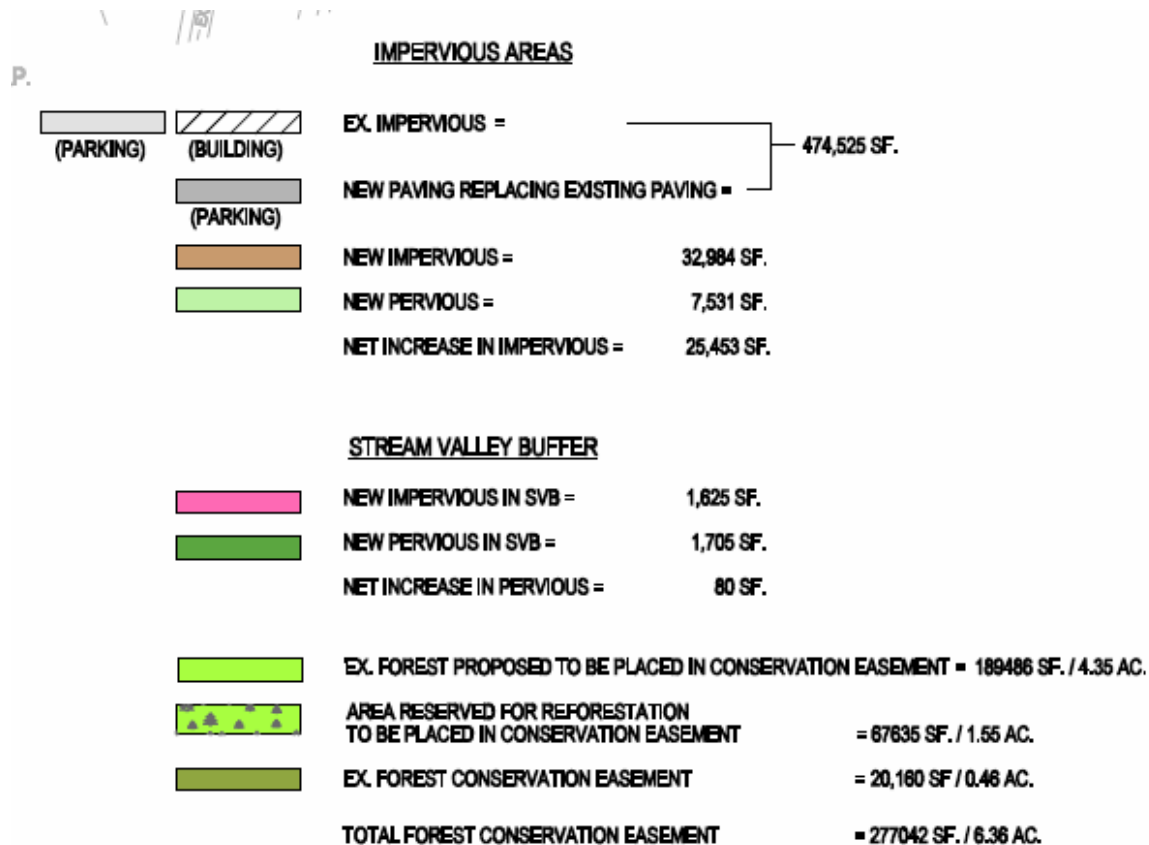
In particular, the proposed helicopter pad which is located at the edge of the stream valley buffer and the proposed bio-filtration facility that is located within the buffer were the focus of intense negotiations between Environmental Planning staff and Petitioner. The negotiation resulted in an agreement that Technical Staff states “will ultimately protect the stream while allowing the hospital to relocate the helicopter pad and install a new stormwater facility in a more accessible and efficient location.” Exhibit 22, p. 2. The solution worked out between the parties also resulted in additional landscaping, removal of previously impervious surface areas, extensive planting, and an environmentally sensitive stormwater treatment (bio-filtration) facility. According to Technical Staff, this additional amenity will benefit the hospital and protect the stream.

Petitioner’s civil engineer, Edward Wallington, also addressed environmental concerns. Tr. 98-105. He noted that the hospital is actually exempt from forest conservation requirements due to the fact that it predates the forest conservation legislation, the lot is already recorded and Petitioner is not proposing to remove any trees. Moreover, construction of the hospital also preceded the stream valley buffer requirement, both of which were evolved somewhere around 1990. The parking located



in the stream valley buffer was constructed before the stream valley buffer criteria were developed by Park and Planning. As shown in the Environmental Enhancement Plan (Exhibit 23(d)), there are quite a few features already in this buffer area. The buffer itself is delineated on the Plan with the “SVB” symbol and a black line. In addition to some of the existing parking, the existing service drive north of the new west addition, the cooling tower and other utilities are also in the buffer. Exhibit 23(d) is shown below, with its legend magnified on the following page:





Park and Planning uses the stream valley buffer as a measure for evaluating new development in terms of its environmental impact or potential for environmental impact. The proposed helipad location is in a spot that works well with the hospital function, but it happens to be in the stream valley buffer (although only part of it will create additional impervious area because some of the pad will be over an existing driveway). In this case, Park and Planning allowed the helipad to be added in the buffer because there are already existing features in the buffer which can be mitigated to offset the potential impact of the helipad. Petitioner agreed to offset the additional impervious area by eliminating a commensurate amount of existing paving that's in the buffer (6 parking spaces), which is the dark green that's highlighted in the upper right-hand (northeast) portion of the parking lot as shown in Exhibit 23(d). In addition, Petitioner agreed to place a new, 5.9 acre forest conservation easement over all the mapped portions of the buffer that are not already in use at the site in terms of

parking, utilities and facilities, and to plant about 1½ acres of trees in the portion that isn't already forested. Because of Petitioner's exemption, there is no requirement for the Planning Board to separately approve a final forest conservation plan. The comprehensive mitigation package addresses the helipad being added within the buffer.

After consulting with DPS and Park and Planning, it was decided that a new biofilter for stormwater management would be added to the buffer, as noted on both Exhibit 23(d) and on the revised Site Plan (Exhibit 23(a) [now 45(c)]). DPS approved the concept storm water management plan in Exhibit 36. DPS approved a waiver of on-site channel protection (quantity controls) because the Hallowell Pond to the east of MGH is a regional channel protection facility. As a result, MGH is required to pay a fee. Quality control is already provided by sand filters and biofilters on site. A new biofilter will also be added, which comports with best management practice (BMP). Thus, the facilities that are there, plus the addition of this biofilter, address the enhanced storm water management BMP language in the Technical Staff report (p. 14). Moreover, there are further quality controls off site at Lake Hallowell. Mr. Wallington stated that Petitioner agreed to all the conditions recommended by the Planning Board, including two additional environmental conditions on page 14 of the Technical Staff report. Tr. 109. Technical Staff concluded that there were no environmental issues associated with the subject application if all recommended conditions are met. Exhibit 22, p.1.

#### **D. Concerns of the Neighbors (Helicopters and Traffic)**

Two concerns were raised by the neighbors, the impacts of helicopter flights and traffic impacts.

##### *1. Helicopter Noise, Vibration and Safety Issues:*

The Opposition's Concerns:

Walter M. Lee wrote on behalf of the Champlain Homeowners Association, indicating in his pre-hearing submissions (Exhibits 25, 27 and 29) that the HOA was generally supportive of the expansion, but objected to the noise and vibrations from helicopters landing at the hospital. In his testimony at the hearing, Mr. Lee stated that the HOA opposed the petition as long as there was any helipad at the hospital. As an individual, he does not oppose the helicopter flights, *per se*, but wants to be able to contact the pilots and modify the helicopter operations. Tr. 169-177.

Mr. Lee also testified that the residents feel that low altitude used by the helicopters coming to and from the hospital over the community poses a safety concern and that long term exposure to the vibrations could cause structural damage to their wooden frame homes. The homeowners have witnessed an increased frequency of helicopter flights, which they believe have gone significantly beyond what was initially promised and expected when they first envisioned the hospital having “a temporary helistop.” Tr. 155-157. In light of that, they cannot support any application or special exception by the hospital which includes a helicopter facility, whether it's permanent or temporary.

Mr. Lee also stated that FAA Advisory Circular 150/5390-2B, Section 404(e)<sup>14</sup>, which makes recommendations on the design of heliports, advises that approach and departure paths could be curved to avoid noise sensitive areas. Tr. 164. According to Mr. Lee, the pilot can choose to come in or leave from a different direction. Sometimes they fly over Mr. Lee's home, and he has seen Medstar and other helicopters, in addition to the state police copters. Tr. 68. He added that “there needs to be more transparency and contact between the air carriers and the pilots and the neighborhoods underneath them.” Tr. 159. He wants MGH to maintain flight logs to facilitate this communication.

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<sup>14</sup> Mr. Lee listed the section as 405(e), but the Hearing Examiner identified the referenced section as 404(e).

Mr. Lee listed five reasons why he feels the petition fails to meet the technical requirements set forth in Zoning Ordinance §59-G-2.27 for a heliport special exception: 1. MGH has not disclosed the proposed number and timing of flights, nor has it maintained a flight log; 2. A noise analysis is required for heliport special exceptions; 3. Under Montgomery County law, an elevated rotor facility must comply with all heliport or helistop design guidelines recommended by the FAA, including having at least two exits; 4. A safety net is needed for the helipad, but Mr. Lee was satisfied with Petitioner's testimony on that point; and 5. There should be a document specifying that the MRI equipment in the hospital is far enough from the helipad to not disturb the navigational and communication equipment on helicopters, creating a safety hazard. Exhibit 44 and Tr. 165-167.

Petitioner's Response:

Petitioner argued at the hearing that §59-G-2.27 does not apply because the helipad use at MGH is ancillary or accessory to the hospital use and that emergency operations are exempted from noise regulations. After the hearing, Petitioner submitted additional information about the proposed helipad and helicopter operations.<sup>15</sup> With regard to helipad design, Petitioner's counsel asserted in a letter dated October 26, 2007 (Exhibit 45):

The proposed helipad will comply with applicable regulations regarding access. Preliminary design shows the full length of the south face of the helipad to be at grade with the emergency/ambulance parking lot. Therefore, access to the pad can be accomplished along the entire south face. The special exception plans transfer from the ED to an awaiting helicopter (not an elevated "catwalk" as might be believed by looking at the plan). If at final design for some reason the south face of the helipad is not at the same grade as the parking lot, then a secondary exit stair will be added.

Attached to counsel's letter was an October 26, 2007, e-mail from Mr. Pickett and from MedStar's Chief Pilot, Scot Deabs, discussing helicopter operations. Mr. Pickett stated:

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<sup>15</sup> Because of their factual content, these submissions and others on the following pages have been quoted at length in this report.



Emergency helicopter patient transports from Montgomery General Hospital average approximately 7 per month. Each transport meets a medical necessity. As more patients visit Montgomery General Hospital, the number of transports may incrementally increase or may decrease as levels of care change such that fewer patients require transport.

The vast majority of helicopter transports from Montgomery General Hospital are carried by MedStar Transport ( approximately 99%). The current approach route is northeast and follows Prince Philip Drive to the existing grass covered landing area. Please see the attached e-mail from MedStar Transport's Chief Pilot, Scot Deabs which documents my telephone conversation with him. Chief Deabs has provided advice to Montgomery General Hospital re: the proposed helipad location. He notes in his e-mail some of the advantages of the proposed helipad. The potential for an East to West approach should give some relief to our neighbors to the west with regard to the noise caused by the current Northeast approach.

Chief Pilot Deabs stated:

The proposed heliport location further east than the current landing area would provide for significantly greater lateral and vertical separation from the residential areas west of Prince Phillip Drive. I would expect a normal approach and departure route along the north perimeter of the campus paralleling the right of way. Helicopters departing towards the west from the proposed location would attain greater altitude before crossing Prince Phillip Drive than those departing from the current landing area. This would provide far greater vertical separation as well as potentially allow for helicopters to turn on course by the time they reach Prince Phillip Drive and eliminate the need to over fly the residential area to the west. Most low level helicopter operations maneuvering to/from the proposed location would be able to remain over the hospital property.

I'll always emphasize the benefits of enhanced security and safety resulting from helicopter operations at an improved heliport over at an unimproved grass area. The proposed location of an improved heliport would keep vehicles and pedestrians safely away from the helicopter as well as provide efficiency of patient transfers to/from the ambulance entrance.

In response to an inquiry from the Hearing Examiner, Petitioner supplemented the record with copies of the site plan approved by the Board of Appeals in CBA-2521-H (labeled Exhibits 5(a) and 7 in that case, and admitted to the current record as Exhibits 48(b) and (c)). The current location of the

helipad is marked as “Proposed Helipad” on the approved site plan from CBA-2521-H, and the Hearing Examiner therefore concludes that the Board had approved the current location.<sup>16</sup>

Petitioner also cited Zoning Ordinance §59-A-6.6(a), which provides that “[e]mergency helipads for hospitals are a permitted use in any zone.” Therefore, Petitioner asserted that MGH need not obtain a heliport/helistop special exception pursuant to §59-G-2.27 to operate an emergency helipad on its grounds; nor does it need Board approval to relocate the existing helipad. Exhibit 48.

Issue Regarding the Authority of the Board of Appeals over Hospital Helipads:

The Hearing Examiner agrees that Zoning Ordinance §59-A-6.6(a) obviates the need to obtain a heliport/helistop special exception pursuant to §59-G-2.27 for an emergency helipad on hospital grounds. However, the Hearing Examiner felt that issues remained as to the Board of Appeals’ authority to regulate the location and operation of the helipad within a special exception site. He therefore held a conference call/meeting with all parties of record on November 5, 2007, to give the parties the opportunity to comment on these issues:<sup>17</sup>

1. What is the Board’s authority, if any, with regard to regulating the location and operation of a permitted use (an emergency helipad at a hospital) within the overall special exception granted to the hospital?
2. What standards should the Board apply in assessing the propriety of the proposed helipad location and operation? and
3. How should this case go forward, procedurally? (*i.e.*, Do the parties need more time to file papers related to these issues? Should there be a further hearing on the matter?)

During the conference call/meeting, Petitioner expressed the position that the BOA has no authority whatever to regulate the helipad’s location and operation even though it operates within a

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<sup>16</sup> The Board of Appeals Opinion in CBA-2521-H (Exhibit 48(a)) is silent with regard to the location of the helipad shown as proposed in the Site plan of that modification petition. Petitioner was unable to find any BOA opinion regarding MGH mentioning the existing helipad (Exhibit 48).

<sup>17</sup> Mr. Kline, Ms. Lee-Cho, and Mr. Klauber were present in the Hearing Examiner’s office, while Mr. Lee participated by speakerphone.

special exception site, because it is a permitted use. The People's Counsel opined that the location of the helipad within the special exception site could be regulated by the Board solely on questions of compatibility with the neighborhood, and the hospital's evidence should show why the proposed location appropriately balanced the hospital's needs against potential adverse effects on the neighborhood at the chosen location. Mr. Klauber also felt that the Board could not regulate operations of the helipad. Mr. Lee felt that the BOA could regulate both location and operations. No party requested that there be an additional hearing. By order dated November 6, 2007 (Exhibit 49), the Hearing Examiner held the record open for an additional day, until November 7, 2007, to allow the parties the time they requested to file additional comments.

Mr. Lee's submission (Exhibit 50) argues that the Board has jurisdiction to review placement of permanent helipads on the site because it is "an ancillary service and integral part of the hospital operations [which] is dependent on the overall approval of the general special exception granted to the hospital." Mr. Lee also argues that the §59-A-6.6 was intended to address emergency events, not permanent helipads at hospitals, and even if it were intended to cover permanent helipads, any such pads would be "dependent on the existence of a hospital special exception," and therefore subject to community input and Board review. This is necessary to protect "the use and enjoyment of adjoining or neighboring properties."

Petitioner's filing (Exhibit 51) argues that the legislative history of both the above-quoted §59-A-6.6(a), and the helipad/helistop special exception, §59-G-2.27, support the proposition that these provisions were intended to permit hospital helipads without Board review. Moreover, Petitioner cites COMCOR §31B-10, which exempts emergency services from noise regulations, and case law, *Hayfields, Inc. v. Valleys Planning Council, Inc.*, 122 Md. App. 616, 716 A.2d 311 (1998),

standing for the proposition that when a use is permitted by right, the BOA has no authority to limit it regardless of adverse impacts on neighbors.

In addition to its legal argument, Petitioner pointed out that “generally the new helipad location is an improvement from the previous landing location in terms of distance from existing residential neighborhoods.” Exhibit 51. Petitioner cited Mr. Wallington’s testimony that the existing helipad is about 400 feet from the nearest home to the north; 1,300 feet to the east; 1,000 feet to the south; and 250 feet to the west. The proposed helipad would be about 400 feet from the nearest home to the north; 900 feet to the east; 900 feet to the south; and 750 feet to the west. Tr. 94-95. Petitioner observed that MedStar’s Chief Pilot, Scot Deabs (quoted above) had stated that the proposed heliport location further east than the current landing area would provide for significantly greater lateral and vertical separation from the residential areas west of Prince Phillip Drive.

Petitioner also supplemented the factual record regarding the necessity of locating the helipad at the proposed location (Exhibit 51, p.3):

Historically, when emergency helicopter landings started to occur at Montgomery General Hospital (which is estimated to have begun in the late 70’s or early 1980’s), landings were conducted in the large open field (13 acres) west of Prince Philip Drive and north of the Hospital’s thrift shop. Eventually, it was determined that this landing zone was too far removed from the Hospital campus. Ambulances were needed to shuttle emergency victims from the emergency room through the Hospital parking lot, across Prince Philip Drive and across the grass field to the landing site. This transfer took too long and was too “rough” on patients for that site to remain as the designated landing site for emergency transportation.

The landing site was then relocated to the open area immediately in front (south of) the Hospital’s main entrance. This put the helicopters as close as possible and on the same grade level as the emergency room and significantly improved the timing and efficiency of emergency transfers. However, in 1999 when the Hospital built its second professional office building (also known as the “Ambulatory Care Center”), perpendicular and to the east of the main Hospital entrance, and a new three level parking garage, parallel to and south of the main entrance to the Hospital, the landing area in front of the Hospital shrank and became “walled in”. With that new construction, the emergency transport

service operators advised the Hospital that there was not adequate maneuvering space to always be able to make a safe landing and that a new landing site had to be designated. It was at that point in time, in approximately 1999, that Montgomery General Hospital designated a location in the northwest corner of its property to serve as the landing area.

Moreover, as pointed out in our recent letter dated November 1, 2007, in 2001, the Board of Appeals reviewed special exception site plans that relocated the helipad to a site in close proximity to the emergency room. Without comment, the Board of Appeals approved the special exception site plan associated with Special Exception Case No. S-2521-H. The landing pad that has been shown in the exhibits for current Special Exception request Case No. CBA-2521-I is located further to the south and further away from residences to the north than was the landing pad that was reviewed by the Board of Appeals in 2001 and, to the extent that the Board of Appeals had any jurisdiction over this question, that location was accepted by the Board of Appeals.

In summary, the location for the helipad proposed in Case No. CBA-2521-I provides the most efficient siting for a helicopter pad and provides the optimum in emergency room care benefits. The information provided above demonstrates how other locations on the Montgomery General Hospital campus have been tried and, eventually, dropped, in most cases moving the helipad further away from surrounding residences. The record of Case No. CBA-2521-H demonstrates that a site that was closer to single family detached residences to the north than is the present proposed location was reviewed and accepted without comment by the Board of Appeals in 2001. Therefore, the Petitioner maintains that not only is the location of the helipad not a subject for review by the Board of Appeals, but that another location, that had the potential of greater possible impact on residences to the north, has previously been reviewed and accepted by the Board of Appeals. Therefore, the present location represents the optimum in efficiency and safety as well as minimizing the impact on surrounding residential uses.

Shortly after filing Exhibit 51, Petitioner located a 1991 Board of Appeals Opinion which briefly discussed the Board's approach to hospital helipads in the context of another hospital's special exception (Exhibit 52(a)). In *Petition of Washington Adventist Hospital (Case No. S-238-A, dated August 1, 1991)*, the Board of Appeals granted a special exception modification request by Washington Adventist Hospital to expand its facilities located in Takoma Park. The proposed changes to the existing special exception included a three-story addition, a two-level parking deck, a



rooftop helipad for emergency purposes, and the leasing of additional spaces from adjacent Columbia Union College.

As Petitioner correctly points out, the Board's Opinion states that "[t]he appellant has submitted details of the helipad and landing proposal. However, this matter is not before us since emergency helipads for hospitals are a permitted use in any zone (59-A-6.6)." *S-238-A Opinion*, p. 2, ¶ 2. Moreover, in making the findings necessary to grant the modification request, the Board specifically states that "[n]o findings are made regarding the helipad because this matter is not before the Board." *Id.* p. 4 ¶2.

Petitioner argues that "Case No. S-238-A is determinative and dispositive of the Hearing Examiner's concerns whether the Board of Appeals should consider helicopter operations in balancing Montgomery General Hospital's needs against potential adverse affects on the community . . . and that no aspect of the emergency helipad (either its location or operations) are subject to the Board's scope of review . . ." Exhibit 52.

#### **Hearing Examiner's Conclusions Regarding the Helipad:**

As will appear more fully below, the Hearing Examiner disagrees with Petitioner's general assertion, but finds that in this case, the evidence supports the proposed placement of the helipad and operations, as described to date. On the legal issue, the Hearing Examiner concludes the following:

1. The Board has no authority to prevent the placement of an emergency helipad on a hospital special exception site it has approved; but
2. The Board does have the authority to regulate that placement and helipad operations on the special exception site so as to minimize adverse impacts on the neighbors, consistent with safety concerns and the needs of the hospital.

This conclusion clearly differs from the position taken by the Board sixteen years ago in *S-238-A, Washington Adventist Hospital*. The Hearing Examiner respectfully suggests that the Board

erred at that time in failing to harmonize the two governing statutory schemes, one of which makes emergency helipads a permitted use at hospitals (§59-A-6.6(a)) and the other of which allows the Board to regulate special exceptions and impose conditions which will reduce adverse effects on the neighborhood from a special exception site (§§59-G-2.31, 1.21 and 1.22(a)).<sup>18</sup>

The hospital special exception conditions under Zoning Ordinance §59-G-2.31 expressly require the BOA to find that the hospital “will not constitute a nuisance because of . . . noise . . . [and] that such use will not affect adversely the present character or future development of the surrounding residential community.” The General Conditions for granting a special exception (§59-G-1.21) also expressly protect the surrounding community from noise and other adverse effects that are not inherent in the nature of the special exception. In addition, §59-G-1.22(a) provides that “The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.”

Petitioner relies on language in the case of *Hayfields, Inc. v. Valleys Planning Council, Inc.*, 122 Md. App. 616, 716 A.2d 311, 322 (1998), for the proposition that when a use is permitted by right, the BOA has no authority to limit it regardless of adverse impacts on neighbors. The language Petitioner quotes from *Hayfields*, however, is merely a general description of land use principles. The court in *Hayfields* does not address the question of a permitted use nested within a special exception site. The *Hayfields* decision expressly recognizes that the Board has the responsibility in special exception cases to consider non-inherent adverse effects on the neighbors:

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<sup>18</sup> The courts have held that legal error by an administrative body should not be perpetuated even where *res judicata* issues are involved, which is not the case here. *Board of County Comm'ers of Cecil County v. Racine*, 24 Md. App. 435 (1978); *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 339 (1983); and *Department of Health & Mental Hygiene v. Reeders Memorial Home, Inc.*, 86 Md. App. 447 (1991).

These cases establish that a special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception use would result in an *adverse effect upon adjoining and surrounding properties unique and different* from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone. *Hayfields*, 122 Md. App. at 642-3, 716 A.2d at 324, citing *Schultz v. Pritts*, 291 Md. 1, 15, 432 A.2d 1319 (1981).

In this context, it is important to understand the following distinction – the right to establish a helipad on hospital grounds may now be inherent in the special exception based on §59-A-6.6(a), but the site conditions of a particular proposed hospital, including its location and its neighborhood, are never inherent, and may serve as the basis for denial of a special exception, if the hospital, with its helipad, would create a nuisance due to those site conditions.<sup>19</sup> Moreover, while the existence of an emergency helipad on hospital grounds is a permitted use under Zoning Ordinance §59-A-6.6(a), its placement and operational characteristics may be non-inherent characteristics of the special exception site approved by the Board, and such non-inherent characteristics of a special exception site are generally subject to regulation by the Board of Appeals to minimize adverse impacts on the neighbors.

Thus, this case presents us with two statutory provisions that must be reconciled, §59-A-6.6(a), which allows emergency helipads as a permitted use at hospitals, and the special exception statutory scheme, which is designed to minimize adverse effects on neighbors from a special exception. In such cases, the Board must attempt to harmonize the two statutory schemes. In *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183, 909 A.2d 694, 700 (2006), the Maryland Court of Appeals held:

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<sup>19</sup> It was also argued at the hearing that the helipad was an accessory use and therefore not subject to review under the heliport special exception. The Hearing Examiner agrees that the helipad here is an accessory use as defined in Zoning Ordinance §59-A-2.1, but it is unnecessary to discuss it in that context because it is also a permitted use under §59-A-6.6(a). In either case, the Hearing Examiner finds that its location and operation within the special exception site may be regulated, subject to certain parameters discussed *infra*.

"[w]here statutes relate to the same subject matter, and are not inconsistent with each other, they should be construed together and harmonized where consistent with their general object and scope." *Gwin v. Motor Vehicle Admin.*, 385 Md. 440, 462, 869 A.2d 822, 834 (2005) [\*\*\*13] (citations omitted); *State v. Ghajari*, 346 Md. 101, 115, 695 A.2d 143, 149 (1997). Therefore, "when two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable." *Ghajari*, 346 Md. at 115, 695 A.2d at 149 (citations omitted); *Mayor of Oakland v. Mayor of Mountain Lake Park*, 392 Md. 301, 316-17, 896 A.2d 1036, 1045 (2006).

The Hearing Examiner concludes that harmonizing in this context means that the Board may not prohibit the helipad or impose conditions that would render its operation unsafe or ineffectual, but within those parameters, it may regulate placement and operational characteristics to minimize adverse impacts on the neighbors.

The subject case provides a good example of why the Board must have some power to regulate things occurring on the special exception site, even permitted activities. Technical Staff observed "the non-inherent impact in this case includes the location of a helicopter pad within stream valley buffer." Exhibit 22, p. 22. If the evidence in this case had demonstrated that the helipad could have been located elsewhere on the site without decreasing safety or impeding the helipad's usefulness to the hospital, it could not be fairly argued that the Board would have to allow its placement in the stream valley buffer. The fact that a use is permitted does not completely trump all other considerations, especially other considerations protected by other statutory provisions. Reasonable conditions would insure that the helipad is located on the site so as to minimize adverse effects on the community, while satisfying the needs of the hospital. In appropriate cases, noise abatement techniques might also be utilized, such as a sound wall or other buffering. If noise-reducing flight paths can be selected consistent with safety, then they should be implemented so as to minimize disturbance to the neighbors.

The subject case involves a modification petition, not a petition to establish a new hospital with a helipad. The hospital exists already, as does the helicopter landing area. However, the current modification petition seeks changes exceeding the threshold which requires the Board, under Zoning Ordinance §59-G-1.3(c)(4)(A), to consider the underlying special exception. It so happens that the evidence in this case demonstrates the propriety of the helipad site selected by Petitioner and approved by Technical Staff and the Planning Board.

The neighbors may have legitimate concerns about helicopter noise and vibrations, but the evidence in this case is that the relocation will not make that problem any worse, and in fact will likely improve it for the neighbors to the west, the only ones who have opposed this petition, by moving the helipad 500 feet to the east and thus further away from them.

The proposal, insofar as it pertains to helicopter landings, changes only the location of the helicopter landing area and the design of the pad itself (concrete versus the existing grass, and additional safety equipment and lighting). There is no evidence that this change will increase any potentially adverse effects upon the community, as to safety, noise, vibrations, visual impact, frequency of flights or anything else. On the contrary, all the evidence points to improvements regarding flight paths, distance from the complaining neighbors and safety considerations. There was also evidence that it will improve the emergency service by allowing the hospital to more readily transport out patients requiring a level of care not available within MGH. (The helipad is not used for receiving patients.) Moreover, Petitioner's supplemental materials demonstrate that there is no other practical location for the helipad. Exhibit 51, p.3.

Under Zoning Code §59-G-1.3(c)(4), the Board (and therefore the Hearing Examiner), may require changes in the conditions of the underlying special exception only when "the expansion, when considered in combination with the underlying special exception, changes the nature or character of

the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.” Since there is no evidence in this case to support such a finding with regard to the relocation of the helipad, the Hearing Examiner concludes that no changes to the underlying special exception are warranted.

Nevertheless, in order to protect the community from any exacerbation of the current situation which might result from the helipad’s relocation, a few new conditions are indicated with regard to the operation of the helipad at its new location. There are unanswered questions relating to the operations of the helipad because helicopter flights are not fully controlled by MGH. The safety of helicopter operations is regulated by the FAA, and not the Board of Appeals. As always, the operation of the special exception, including the helipad, must comply with all applicable federal and local regulations, as specified in the final condition recommended in this report. Also, a log of flights should be maintained to insure that the helipad continues to be used only for medical necessity. (It is a permitted use only as an “emergency helipad.”) A condition to this effect has been recommended.

In addition, a condition is recommended requiring Petitioner to review the helicopter flight paths and determine which ones will minimize disturbance to the surrounding community. To the extent that MGH has control over the flight paths used, it should establish a preference, consistent with safety and operational concerns, for using the flight paths which minimize disturbance to the surrounding community. If Petitioner does not control the flight paths, then it should consult with the appropriate controlling authority to encourage use of the flight paths which minimize disturbance to the surrounding community, without adversely impacting safety and operational considerations. The results of Petitioner’s review should be submitted to the Board within six months after the relocated helipad becomes operational. This condition does not require Petitioner to change any of its

operational features if they are needed to insure safety and functionality. It merely requires that, within those parameters, the neighbors' concerns about noise and vibrations be addressed.

2. Traffic Issues:

A neighbor, Robert F. Berg, e-mailed the Planning Board to suggest that the traffic mitigation measure proposed by Petitioner and approved by the Planning Board (adding a right turn lane to the westbound approach of Old Baltimore Road to Georgia Avenue) would do little good. His e-mail is attached to the Technical Staff report. Mr. Berg did not oppose the petition, but rather suggested a number of alternative mitigation plans for elsewhere in Olney "related only indirectly to the MGH expansion."

Technical Staff responded (Exhibit 22, p.21):

The required APF improvement, construction of a separate westbound Old Baltimore Road to northbound Georgia Avenue right-turn lane, was proposed by the applicant to mitigate the overall impact of the additional density being planned at Montgomery General Hospital. If the Planning Board is to consider an alternative improvement to the required APF improvement at the intersection of Georgia Avenue and Old Baltimore Road, then staff recommends that the Planning Board require the applicant to provide a shared-use path along Old Baltimore Road between Menden Farm Drive and Covered Wagon Way in-lieu of the required APF improvement.

The Planning Board elected to require the Old Baltimore Road right turn lane suggested by Petitioner (Exhibit 28, p. 2, ¶ numbered 5).

During the hearing, Mr. Hedberg addressed the main traffic mitigation suggestion made by Mr. Berg. In Mr. Hedberg's opinion, Mr. Berg's suggestion would not mitigate the traffic in question sufficiently to allow Petitioner to meet the LATR standards, which Petitioner's proposal does. Tr. 151-152. The Hearing Examiner accepts Petitioner's mitigation proposal because it would provide the



level of mitigation required under LATR, it was suggested in the Master Plan and it was approved by Technical Staff and the Planning Board.

The Hearing Examiner finds that all of the community concerns regarding CBA 2521-I were appropriately addressed.

### **III. SUMMARY OF THE HEARING**

#### **A. Petitioner's Case**

Petitioner called four witnesses at the hearing, Harold Pickett, Vice President of Facilities Management for Montgomery General Hospital; Ed Wallington, a civil engineer; Paul Piazza, senior project manager for this expansion; and Craig Hedberg, a traffic engineer. Walter M. Lee testified on behalf of himself and the Champlain Homeowners Association,<sup>20</sup> and expressed concerns about helicopter noise, as detailed below. Except for that concern, there was no opposition to the petition.

The Hearing Examiner announced, as a preliminary matter, that he lives near Suburban Hospital, and there is also a helicopter noise issue regarding Suburban Hospital about which he has complained. All parties were given the opportunity to object to the Hearing Examiner conducting the hearing in which helicopter noise is an issue, but all stated that they had no objection. Tr. 7-9.

#### **1. Harold M. Pickett (Tr. 18-69):**

Harold M. Pickett testified that he is Vice President of Facilities Management for Montgomery General Hospital. Mr. Pickett stated that Petitioner agreed to all the conditions recommended by the Technical Staff. Tr. 19. He testified that there were five primary objectives of the proposed expansion project: to increase the emergency services capacity and throughput, which is at capacity now, in order to decrease the wait times of emergency room patients from several hours to a much

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<sup>20</sup> Mr. Lee clarified at the hearing that he does not speak for the umbrella homeowners association, Champlain and Environs Homeowners Association, although his pre-hearing filings (Exhibits 25 and 27) referenced both the umbrella organization (Environs) and other HOAs (Champlain, Townes and Waterview). Tr. 4-5.

more acceptable period of time; to convert the hospital's inpatient units beds to all private rooms in order to increase the safety and comfort level and the experience for the patients and their families;<sup>21</sup> to relocate outpatient services more to the front of the hospital where they're more accessible and closer to parking; to provide the necessary parking; and to retain some flexibility for future growth on the site, conserving as much land as possible and building as close as possible to the existing building. Tr. 21-23.

Mr. Pickett further testified that the project involves approximately 82,250 square feet of new construction, and approximately 31,000 square feet of renovation to existing space. The west addition will add three floors on the west side, the first floor of which will be the emergency room, and the second floor, outpatient services and some relocated dining. The third floor will be shell space for future. The west addition is 68,500 square feet of the 82,250 total. The east addition is a two-floor building, of about 13,750 square feet, which allows offloading of existing inpatient related functions that are in the big patient towers.

MGH's emergency department (ED) currently treats about 36,000 per year (about 98 to 100, per day), which is the maximum capacity of the existing ED. The new emergency room would have 40 treatment bays, all private rooms. It would have a capacity of about 60,000 visits per year, and it is expected that the actual visits will increase gradually to about 50,000 per year by 2013 (about 136 per day). Mr. Pickett anticipates some, but not a significant increase in non-ED outpatients, and the main reason for the relocation of non-ED outpatient services was to remedy the inconvenience of the current location to impaired patients. The hospital will also have an elevator built that goes from the ED all the way up to the six floors of the hospital, even though only three levels are being finished at this point. This will enable patients to be easily transported from the ED to any of those inpatient units, particularly critical care, and also, to the addiction and mental health unit on the 6th floor.

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<sup>21</sup> All of the rooms in the hospital except for the two-on-one unit will be private rooms.

The second floor of that west addition above the ED would house some of the outpatient services, including cardiopulmonary services, cardiac and pulmonary rehab, physical rehab, occupational therapy and speech therapy. Where the dining hall is currently located will be renovated for outpatient services, so the dining hall will be relocated into another portion of the second floor in the new addition.

The east addition is a two-floor expansion to the administrative office building. The reason for doing that expansion is to offload non-inpatient related functions that are now in the clinical tower (*i.e.*, the existing six-story hospital building) into the new adjoining building so that the vacated space can be used for the transition from semi-private to private rooms. There will be no increase in the number of patient beds, but more space is needed when you convert a semi-private room with two patients into a private room. The reason for doing that is increased patient satisfaction, infection control, safety and greater family access around the clock.

Mr. Pickett further testified that the helipad is currently located on a grassy area in the extreme northwestern corner of the campus. The helicopters don't bring patients into the hospital; they take patients away who need a higher level of care. "Each event is a lifesaving event. All are necessary flights. None of them are for just a matter of convenience." Tr. 36. Currently, an ambulance is brought in to transport the patient from the ED over to the helipad, and then flown out. The new helipad is intended also just to transport patients out to higher levels of treatment. The proposed helicopter pad will be 500 feet closer to the ED than the current one, which will allow staff to just roll the patient right out of the ED and into the new helipad. This pad will be heated, properly lighted and a safer landing area for the helicopters, and that is something that the rescue services and the state aviation are looking forward to. It also will free up an ambulance that currently is required to transport the patient to the helipad. Tr. 38-41.

The helipad is used on average about six or seven times a month. The new location will be about the same distance from the neighbors to the north (James Creek) but further away from the western neighbors in Champlain Environs. From a safety standpoint, it would be safer for the arriving helicopters to arrive on a properly built pad than on a grassy area. In winter, when there's ice and snow, MGH must fill that area and prepare for a helicopter arrival, which is slower and a little trickier for them to land. It would be safer for them to land on a properly built pad, with proper heating so that the pad can be maintained, and with lighting and wind socks. So the new helipad would be safer, and they can arrive and get out faster, which is important because time is of the essence for the patients who need the next level of care. Tr. 42-44.

MGH has no influence on the selection of the aircraft or flight paths used by MedStar or the state aviation services. Most of the flights are from MedStar, coming out of Washington Hospital Center or the state aviation services. Occasionally, there is a flight out of John Hopkins for University of Maryland. The pilot determines the route that they're going to take based on weather conditions and prevailing winds, et cetera. Tr. 45. According to Mr. Pickett, MGH is expecting initially that the number of helicopter flights will be unchanged after transfer over to the new location. As the ED gets busier with more patients, it's likely that there might be more of them that need a higher level of care and have to be sent out. Tr. 53-54. On the other hand, as MGH's services improve, it may be that fewer flights out may be necessary, or it may be "a wash." Tr. 57.

The hospital operates 24 hours a day, 7 days a week, and employs about 1200 people, with 500 being on the heaviest shift. The increase in ED staff by about 14 will occur over a five or six year period. Initially, there would be only one or two extra per shift, but ultimately that would increase to four or five per shift. Tr. 46-48.

Mr. Pickett testified that he had been in contact with the Greater Olney City Association and citizens from James Creek, and there was no opposition from the community to MGH's plans. Their concern really was the noise that comes from the cooling towers, which are not being changed. He is not aware of any noise, fume, odors or activity level that would be bothersome or a nuisance to the surrounding neighbor. The only complaints have been about occasional noise like an untimely leaf blower or delivery truck. Nothing about the use would be detrimental to the use and enjoyment of the surrounding properties. It will remain in harmony with the character of the surrounding neighborhood.

Mr. Pickett indicated that he does not keep a log of helicopter flights, but a form is submitted to the security people for each flight. His impression, based on discussions with rescue staff and feedback from the architects, is that the preferred flight path is to approach from the south and leave toward the north. Tr. 54-56.

2. Edward Wallington (Tr. 70-113 ):

Edward Wallington testified as an expert in civil engineering. He commented on the good road network in place around the hospital. The hospital is surrounded by residential uses, but there is some buffering around the hospital. Further to the east, the Olney Town Center is more of a retail/commercial use. Mr. Wallington indicated that the darker green area on Exhibit 31, located on the northern part of the main campus, is an area that will be placed in a forest conservation easement. It is predominantly wooded, although some of the area is now open. Through discussions with Park and Planning, Petitioner agreed to provide additional planting in that area, as shown on Exhibit 23(d).

That exhibit actually shows three different graphical symbols in that area to the north. The darker, kind of pea green color is the existing forest that was placed in conservation easement in the past related to another development. The lighter green is all of the area that Petitioner will be placing in easement. The area that is stippled with a tree-type symbol will be planted with new trees.

The light green without the symbol is already forest-covered. According to Mr. Wallington, these plantings will improve the buffer between the hospital and the residences to the north. Some of the proposed plantings are contemplated immediately north of the helipad.

Using an aerial photo (Exhibit 32), Mr. Wallington described the surrounding area. He is familiar with the surroundings because he participated in the development of the communities to the north and east, and his involvement with MGH gave him familiarity with the area to the west and south.

To the north is the James Creek development. Spartan Road is a significant road that runs east and west through that community, and the homes are typically residential cul-de-sacs. These homes are predominantly single family, again divided or separated from the hospital by a fairly substantial stream valley buffer. And there is, off to the northeast further away, an existing school site, which is accessed from Spartan Road and Baltimore Road. Beyond that are another stream valley buffer and more residential communities.

Hallowell is a large project to the east of the campus. The Hallowell subdivision is a residential community. It is a mix of single-family detached and townhouses. The units closer to the hospital tend to be more detached units. The ones near the Hallowell Pond, which are shown on the plan, are townhouses. There is a cul-de-sac directly southeast of the hospital, which has detached homes. The area between that cul-de-sac and the hospital is a wooded stream valley buffer.

To the west are a couple of different features. There is a large, open field that's currently controlled by Montgomery General Hospital, there is an existing use across Prince Philip Drive, immediately to the west of the hospital, which is known as Winter Growth, an adult daycare facility. Beyond that is a regional pond that serves as storm management control for the Olney Town Center, and then there are some existing residential uses, mostly attached units. Mr. Lee lives in that

community. Further west, the entire area just to the east of Georgia Avenue is generally known as the Olney Town Center. It is fairly heavily developed with retail and commercial uses, some strip shopping centers. Those retail and commercial uses to the west also extend just to the west of Georgia Avenue and south of Route 108 (Olney Sandy Spring Road).

South of the hospital are lower density residential uses, partly in Hallowell. Continuing to the south are the early phases of Hallowell, which are residential south from Route 108 for about a mile, all the way to Georgia Avenue. There are also some churches, and a mix of miscellaneous uses, within the residential theme.

The view of the hospital will change because there are new elements being constructed. However, the existing hospital is a six-story high building, and the planned expansion is three stories with an elevator shaft that's being constructed. So there would not be a new visual impact in terms of a much larger, taller building with much larger mass or height being constructed. It would be a natural add-on to what is there. There will not be much greater mass, and there are existing buildings which will screen much of the view of the new buildings from the residential areas, as can be seen on Exhibit 31 ( the rendered Landscape Plan). The yellow coloring represents existing buildings or the existing parking garage. The hospital tower is in the center of the site. There are two medical office buildings. The smaller administrative building is located to the east of the tower, and the existing parking structure is highlighted to the south.

The orange color represents the new building expansions, the western addition, which is where the emergency room expansion is occurring, and the eastern addition, which is the administrative building expansion. The existing parking that's going to remain is highlighted in white, so you can see the existing parking bays are located throughout the whole site.



There is parking that will be removed and replaced with new parking. The new parking lot is a medium gray color to distinguish from the existing parking. The orientation of the drive aisles has been modified to some degree. The parking that's being removed is essentially an old parking lot built years ago. Part of the function of the new parking lot is to serve the new walk-in entry to the emergency room located on the south of the new building. The new driveway will run in an east west direction to provide for that function, and new parking bays were developed off of that idea.

The original application proposed new parking along the existing service drive that's in the area of the helipad, but the environmental planning staff of Park and Planning, although supporting the new helipad location, were not in favor however of adding new parking spaces for environmental reasons. That accounts for the difference between the 12 new spaces in the final plans and the 56 originally proposed. Petitioner also agreed to remove some activity that's already in the buffer. The reduction of new parking spaces is a function of environmental concerns and does not relate to the circulation of the ambulances, which will be improved in the new plans. The highlighted dark green on Exhibit 31 is generally representative of the landscaping that's at the site. The new landscaping is shown in a lighter green, primarily around the new parking lot.

Mr. Wallington also testified as to the distances from the proposed new structures to the residential neighbors (Tr. 92-95): The closest house in James Creek is approximately 550-600 feet away from the proposed west addition; it is about 600 feet to the closest one to the west; 1,000 feet from the westerly expansion to the closest buildings to the existing buildings to the east; to the south, it again is approximately 600 feet. From the proposed east addition, the distance to the nearest northern residence is about 550 feet; to the east, also 550 feet; to the south, about 500 feet; and to the west, about 1000 feet.

According to Mr. Wallington, the existing helipad is about 400 feet from the nearest home to the north; 1,300 feet to the east; 1,000 feet to the south; and 250 feet to the west. The proposed helipad would remain about 400 feet from the nearest home to the north; 900 feet to the east; 900 feet to the south; and 750 feet to the west.

As to public facilities, Mr. Wallington testified that the water and sewer supply infrastructure that's in place is more than adequate to accommodate this expansion, and even further expansions that might be contemplated. Moreover, the expanded hospital will more than meet all the specified development and parking standards. Mr. Wallington noted that only 697 spaces would be required, but that requirement doesn't reflect the actual demand for parking spaces needed for a hospital. Nevertheless, Petitioner will be providing 1,181 spaces, which will be adequate. Nearby public transit also helps.

Mr. Wallington also addressed environmental concerns. He noted that the hospital is actually exempt from forest conservation requirements due to the fact that it predates the forest conservation legislation, the lot is already recorded and Petitioner is not proposing to remove any trees. Moreover, construction of the hospital also preceded the stream valley buffer requirement, both of which were evolved somewhere around 1990. The parking located in the stream valley buffer was constructed before the stream valley buffer criteria were developed by Park and Planning. As shown in Exhibit 23(d), there are quite a few features already in this buffer area. The buffer itself is delineated with the "SVB" symbol on the map and a black line. In addition to some of the existing parking, the existing service drive north of the new west addition, the cooling tower and other utilities are also in the buffer.

Nevertheless, Park and Planning uses the stream valley buffer as a measure for evaluating new development in terms of its environmental impact or potential for environmental impact. The

proposed helipad location is in a spot that works well with the hospital function, but it happens to be in the stream valley buffer (although only part of it will create additional impervious area because some of the pad will be over an existing driveway). In this case, Park and Planning allowed the helipad to be added in the buffer because there are already existing features in the buffer which can be mitigated to offset the potential impact of the helipad. Petitioner agreed to offset the additional impervious area by eliminating a commensurate amount of existing paving that's in the buffer (6 parking spaces), which is the dark green that's highlighted in the upper right-hand (northeast) portion of the parking lot as shown in Exhibit 23(d). In addition, Petitioner agreed to place a new, 5.9 acre forest conservation easement over all the mapped portions of the buffer that are not already in use at the site in terms of parking, utilities and facilities, and to plant about 1½ acres of trees in the portion that isn't already forested. Because of Petitioner's exemption, there is no requirement for the Planning Board to separately approve a final forest conservation plan. The comprehensive mitigation package addresses the helipad being added within the buffer.

After consulting with DPS and Park and Planning, it was decided that a new biofilter for stormwater management would be added to the buffer, as noted on both Exhibit 23(d) and on the revised Site Plan (Exhibit 23(a) [now 45(c)]). DPS approved the concept stormwater management plan in Exhibit 36. DPS approved a waiver of on-site channel protection (quantity controls) because the Hallowell Pond to the east of MGH is a regional channel protection facility. As a result, MGH is required to pay a fee. Quality control is already provided by sand filters and biofilters on site. A new biofilter will also be added, which comports with best management practice (BMP). So that, the facilities that are there, plus the addition of this biofilter, address the enhanced stormwater management BMP language in the Technical Staff report (p. 14). And on top of all of that, there are further quality controls off site at Lake Hallowell. Mr. Wallington stated that Petitioner agreed to all

the conditions recommended by the Planning Board, including two additional environmental conditions on page 14 of the Technical Staff report. Tr. 109.

Mr. Wallington testified that the application complies with all the standards and requirements of the zoning ordinance for the use and for the zones in which it is located, and will not adversely affect the surrounding area.

3. Paul Piazza (Tr. 114-135):

Paul Piazza testified that he is the senior project manager for this expansion, so all of the design entities in the organization report to him. He manages the progress of the project and liaison with the client, and makes sure the project is built to scope. Mr. Piazza introduced two renderings of the proposed additions, Exhibits 38 and 39, and described the portions of those pictures depicting the additions.

According to Mr. Piazza, access to the proposed helipad will be through a single entrance on the south. The helipad is elevated, although the southern edge of helipad is at the same elevation as the hospital. Because the land is sloping away from the hospital, the north elevation of the helipad is approximately 16 feet above the ground at that location, with a drive underneath it.

Mr. Piazza further testified that the direction and the philosophy that was taken in the design of this project was to maintain the campus environment, which is a combination of light-colored and brown-colored brick and a lighter colored synthetic plaster material. That theme was maintained in both planned additions. Also, using a series of broken surfaces of brick and synthetic plaster, Petitioner will be able to reduce the overall massing of the six-story tower onto the main entrance of the campus. On Exhibit 39, which is the administrative office, this follows suit. Similar design practice, maintaining the banding and the light-colored brick with respect to the darker-colored brick,

the light brown brick. That mimics effectively the hospital that is directly behind it and also the adjacent medical office building. So the theme is maintained using similar fabrics.

According to Mr. Piazza, the residential touch is maintained with soft colored bricks and the lighter colored accents, which do not follow any of the modern architectural features of administrative facilities – no large expanses of glass, no atriums, a very low profile, low-key building.

Mr. Piazza indicated that the reduction in the proposed amount of additional parking will not have any impact on the improved access to the emergency room and the helipad. The lights that are associated with the helipad are only low-wattage marker lights that are embedded in the surface of the pad and only come on when a helicopter is coming in to land. They're not for illumination to the helipad. He testified that at the rear and side lot lines, a photometric study would show 0.1 footcandles or below. Tr. 124. {Since he was not a lighting expert, Petitioner agreed to supplement the record with a photometric plan showing that lighting at the rear and side property lines would not exceed 0.1 footcandles}.

Mr. Piazza further testified that the fuel tank that is located under the helipad is just strictly for use in an emergency generator. The “H” on the helipad as depicted on the site plan was not intended to indicate direction of approach for the helicopters; it was just placed on the site plan to indicate it was a helipad. Appropriate agencies will be consulted later to determine the correct orientation of the “H.” Because the helipad is elevated at some points 16 feet above the driveway, the regulations require a safety net on the perimeter of the helipad. The safety net is a fabric net that extends horizontally, at the same level as the pad, approximately 10 feet beyond the perimeter of the helipad, except where the walkway connects to the pad.

Mr. Piazza indicated that there is a relationship, a ratio of the rotor diameter of the helicopter with respect to the closest structure, and its height. The proposed location of the helipad puts it in

proper perspective with the elevation of the two-story and the six-story existing buildings, and with respect to the proposed three-level addition. There are other safe spots on the campus, but the proposed spot optimally balances safety and the need to get it as close to the emergency room as possible. Tr. 129-130.

4. Craig Hedberg (Tr. 136-154):

Craig Hedberg testified as an expert in transportation planning and traffic engineering. Mr. Hedberg did a local area transportation review (LATR) assessing the impact of the proposed improvements on the community. The proposed changes will generate about 110 new trips in the a.m. peak hour and 95 in the p.m. peak hour.<sup>22</sup> These figures are based on the floor space being added that will generate new trips, not on new staff being added. Some new floor space, such as the expanded dining room and converting double rooms into single rooms do not generate new trips.

Technical Staff determines the LATR study area (*i.e.*, how many intersections out from the hospital must be evaluated) by considering all the trips that are generated by a site, not just those resulting from the expansion. In this case, the expansion, itself, will only going generate about 110 trips; however, when combined with existing trip generation [of 637 a.m. peak-hour trips], Technical Staff required that 11 off-site and 4 on-site driveway intersections be studied.

Mr. Hedberg indicated that he followed the full procedures outlined in the local area review guidelines, and he found that all 11 off-site intersections and the four driveways servicing the hospital operate within the adopted congestion standard for Olney except for one, which was Georgia Avenue and westbound Old Baltimore Road during the a.m. peak hour.

To offset the impact of site traffic at that intersection, Petitioner proposed to construct a third, right-turn, westbound lane on Old Baltimore Road approaching Georgia Avenue. Mr. Hedberg

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<sup>22</sup> The new trips specified in Mr. Hedberg's report (Exhibit 19(a), p. 15, Table E) are 108 in the a.m. peak hour and 93 in the p.m. peak hour.

pointed out that this intersection improvement was identified in the Olney Master Plan [p. 103]<sup>23</sup> as a potential improvement that could be considered to address congestion situations. With the construction of that improvement, the total traffic conditions would be reduced below the background conditions, thus providing the mitigation that is required under the local area review guidelines. According to Mr. Hedberg, both the state highway administration and Technical Staff reviewed and approved his report [Exhibit 19(a)].

In addition to access by car, there are seven buses that serve the subject site, five Metro buses and two Ride-on buses, and the buses actually come from Prince Philip Drive into the subject site, so there is excellent public transportation available for employees and visitors. In Mr. Hedberg's opinion, the proposed use will be served by adequate public transportation facilities, and the internal circulation system will be safe, adequate and efficient. One major proposed improvement is the separation of the emergency vehicles from the visitors and potential patients to the emergency room, which will certainly be a much more efficient and safer situation.

Mr. Hedberg stated that in his opinion, the land-use neighborhood does not correlate with the traffic study area because the size the traffic study area is based on the entire amount of traffic generated by the hospital, not just on the amount generated by the additions. Therefore, the traffic study area is much larger than it would be if one considered just the impacts of the modifications, as he demonstrated on Exhibit 42. However, in response to the Hearing Examiner's questions, Mr. Hedberg admitted that his traffic study revealed traffic impacts from the proposed additions at both the farthest intersection studied to the north (Georgia Avenue and Gold Mine Road) and the farthest intersection studied to the south (Georgia Avenue and Baltimore Road).

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<sup>23</sup> Mr. Hedberg testified that he thought the reference was at page 99 of the Master Plan, but it actually is at page 103.



Mr. Hedberg addressed the traffic mitigation suggestions made by a neighbor, Robert F. Berg, in an e-mail to Technical Staff, which was attached to their report. In Mr. Hedberg's opinion, Mr. Berg's suggestions would not mitigate the traffic in question sufficiently to allow Petitioner to meet the LATR standards. The background CLV at the failing intersection of Old Baltimore Road and Georgia Avenue is 1,531. Adding the traffic from the expansion, the critical lane volume goes to 1,535. By adding the extra lane, CLV drops down to 1,530, bringing the intersection under the congestion standard at the background level.

### **B. Community Concerns**

Walter M. Lee, individually and on behalf of the Champlain Homeowners Association (Tr. 4-5, 66-67; 155-179):

Walter M. Lee testified on behalf of himself and the Champlain Homeowners Association, and he expressed concerns about helicopter noise. Mr. Lee clarified at the hearing that he does not speak for the umbrella homeowners association, Champlain and Environs Homeowners Association. Tr. 4-5. According to Mr. Lee, Champlain Homeowner's Association is the subdivision of Environ Community in Olney, Maryland. It has around 150-plus homes, and they object to the application "on the grounds that the inclusion of the heliport or helistop and its operation, whether temporary or permanent, is incompatible with the surrounding residential community. They would like to petition relief from the low altitude helicopter approaches and takeoffs and the generally powerful noise levels and vibrations that are shaking their homes at their very foundation." Tr. 155-156.

Mr. Lee testified that the residents also feel that low altitude used by the helicopters coming from and to the hospital over the community poses a safety concern that sooner or later may lead to a major accident. In addition, the residents fear that the long term exposure to the vibrations could cause structural damage to their wooden frame homes. The homeowners have witnessed an increased frequency of helicopter flights, which they believe have gone significantly beyond what was initially

promised and expected when they first envisioned the hospital having “a temporary helistop” that they currently have through a special exception. In light of that, they cannot support any application or special exception by the hospital which includes a helicopter facility, whether it's permanent or temporary. Mr. Lee added that “there needs to be more transparency and contact between the air carriers and the pilots and the neighborhoods underneath them.” Tr. 159. He wants MGH to maintain flight logs to facilitate this communication. He has seen Medstar and other helicopters, in addition to the state police copters.

Using Exhibit 32, Mr. Lee pointed out where he lives (on Pallidan Terrace), which is northwest of the subject site. Champlain is southwest of the site, at Spartan Road and Route 108, and apparently the helicopter is more or less flying over them.

Mr. Lee admitted that the Olney Master Plan supports the hospital in its growth, but noted that the Master Plan doesn't make any mention of support of a heliport, a helipad or helicopter operation, and that the hospital is not a Medevac hospital. So, he wonders “whether we need it or not.” He also stated that FAA regulation 150/530(b)(2)(b), Section 405(e), advises that approach and departure paths could be curved to avoid noise sensitive areas. Tr. 164. Mr. Lee testified that, according to FAA regulations, the legs of the “H” on the helipad tell the pilot the direction of the preferred approach. Tr. 66-67. The pilot can choose to come in or leave from a different direction. Sometimes they fly over Mr. Lee's home. Tr. 68.

Mr. Lee added five reasons why he opposes the petition: 1. The technical merits of the application do not meet requirements set forth for a heliport special exception; 2. He would like a noise analysis, which is required for heliport special exceptions; 3. Under Montgomery County law, an elevated rotor facility must comply with all heliport or helistop design guidelines recommended by the FAA; 4. A safety net is needed for the helipad, but Mr. Lee was satisfied with Petitioner's testimony on that point; and 5. There should be a document specifying that the MRI equipment in the

hospital is far enough from the helipad to not disturb the navigational and communication equipment on helicopters, creating a safety hazard. Tr. 165-167.

Under cross-examination, Mr. Lee explained how his position on behalf of Champlain HOA evolved. He first approached them, along with other local HOAs. He indicated that Champlain opposes only the helicopter operations. As an individual, he does not oppose the helicopter flights, *per se*, but wants to be able to contact the pilots and modify the helicopter operations. Tr. 169-177. [Petitioner's attorney noted that the helipads associated with hospitals are ancillary uses and are not subject to the requirements of the heliport special exception. Tr. 179].

### **C. People's Counsel**

Martin Klauber, the People's Counsel, participated in the hearing, but did not call any witnesses. He expressed his conditional support for petition, the condition being that Petitioner satisfactorily address the points raised by Mr. Lee with regard to the helipad and the operations. Tr. 180-183. Mr. Klauber praised Mr. Lee's efforts, but noted that "the helicopter service at the hospital is what's called an ancillary, secondary, maybe even a tertiary use that is now permitted in every hospital we have in Montgomery County." He opined that it is not controlled by other special exception regulations and that, contrary to Champlain's position, it is not in the public interest to bar emergency helicopter flights to hospitals.

During the course of the hearing, Mr. Klauber opined that the issues raised in Mr. Lee's written submission (Exhibit 29) "have to be fully explored to determine or even reach the conclusion that the relocation may be a good thing for the community that Mr. Lee represents." Tr. 59-60. He felt that the record ought to be supplemented with information regarding flight paths. Tr. 59-60.

[Petitioner's counsel responded that all the county's hospitals have helipads, so the Council has to assume that the helicopter traffic is an inherent effect of having a hospital location. Chapter 31(b), which is the County's noise ordinance, exempts emergency vehicles (fire/rescue services) from it. The flight patterns cannot be predicted because they are controlled by factors that vary day by day, and MGH can't tell them any different route to go in. He characterized it as a "red herring issue," because there's little control MGH has over it, and the county government's already made a decision that it allows emergency helicopter flights to occur in the safest, most secure manner. Distances to houses can be shown, but it is not going to affect the actual day to day operations. Tr. 60.]

In response to the Hearing Examiner's questions, Petitioner's counsel did concede that the Board could consider the helipad's location with regard to neighboring residences "to the extent that you had land area where there was another site that was, would appear to be a better, of less impact, and that there was some discretion involved. But here, I think we've been able, Mr. Pickett's testimony, we've been able to demonstrate it is the best thing for the operation of the ambulance, I'm sorry, of the helicopters and the hospital." Tr. 61.]

Mr. Klauber then noted that, irrespective of the noise ordinance, helicopters, as with any inherent characteristic, can become non-inherent and a basis for denial because of site conditions. Tr. 62-63.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and

the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. At the beginning of this report, we noted that because the proposed modifications would expand floor area by more than 7,500 square feet, under Zoning Ordinance §59-G-1.3(c)(4)(A), the Board may require that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if it finds that the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. Otherwise, the inquiry must be limited to discussion of those aspects of the special exception use that are directly related to the proposed modifications.

Thus, the threshold issue in this case, established by Zoning Code §59-G-1.3(c)(1), is whether the proposed modifications, when considered in combination with the underlying special exception, change the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

The use will, of course, remain a hospital under Zoning Code §59-G-2.31. The overwhelming weight of the evidence supports the testimony of Petitioner's witnesses that the improvements can be implemented without substantially changing the nature and character of the use of hospital property, and the Hearing Examiner so finds. As discussed in the following pages, based on the testimony and evidence of record, the Hearing Examiner concludes that the Petitioner will continue to meet both the general requirements for special exceptions and the specific requirements spelled out in Zoning

Ordinance §59-G-2.31 for hospitals, as long as Petitioner complies with the conditions set forth in Part V, below.

### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff has identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with hospitals. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modifications that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff did not enumerate the inherent characteristics of a hospital, but the Hearing Examiner finds that the inherent characteristics are a large, high-density, high-bulk physical plant, with some visual impact on its surroundings; hospital operations running round the clock, seven days per week; a large staff; a large number of patients and visitors; a significant amount of traffic and parking commensurate with the size of the staff and patient body; a certain amount of operational noise from *e.g.* air-conditioning systems; a large amount of bio and other waste which must be carefully disposed-of; a significant amount of external lighting needed for safety; and an emergency helipad. Tr. 60 and 180. The Hearing Examiner notes that while the existence of an emergency helipad on hospital grounds is a permitted use (Zoning Ordinance §59-A-6.6(a)), its placement and operational characteristics may be non-inherent characteristics of the special exception site approved by the Board, and those factors may therefore be regulated by the Board of Appeals to minimize adverse impacts on the neighbors, as discussed extensively in Part II. D. of this report.

As pointed out earlier, this conclusion differs from the position taken by the Board sixteen years ago in S-238-A, *Washington Adventist Hospital*. In that case, the Board refused to consider issues related to a helicopter pad at a hospital because it was a permitted use. BOA Opinion of August 1, 1991, p. 2 ¶2. The Hearing Examiner respectfully suggests that the Board erred at that time in failing to harmonize the two governing statutory schemes, one which makes emergency helipads a permitted use at hospitals (§59-A-6.6(a)) and the other which allows the Board to regulate special exceptions and impose conditions which will reduce adverse effects on the neighborhood from a special exception site (§§59-G-2.31, 1.21 and 1.22(a)).<sup>24</sup>

That is not to say that the Board may prohibit the helipad or impose conditions that would

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<sup>24</sup> The courts have held that legal error by an administrative body should not be perpetuated. *Board of County Comm'ers of Cecil County v. Racine*, 24 Md. App. 435 (1978); *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 339 (1983); and *Department of Health & Mental Hygiene v. Reeders Memorial Home, Inc.*, 86 Md. App. 447 (1991).



render its operation ineffectual. Yet, the Board must have some power to regulate things occurring on the special exception site, even permitted activities. The fact that a use is permitted does not completely trump all other considerations, especially other considerations protected by other statutory provisions. In such cases, the Board must attempt to harmonize the two statutory schemes. *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183, 909 A.2d 694, 700 (2006).

Harmonizing in this context means that the Board may not prohibit the helipad or impose conditions that would render its operation unsafe or ineffectual, but within those parameters, it may regulate placement and operational characteristics to minimize adverse impacts on the neighbors. It so happens that the evidence in this case demonstrates the propriety of the site selected by Petitioner and approved by Technical Staff and the Planning Board. The neighbors may have legitimate concerns about helicopter noise and vibrations, but the evidence in this case is that the relocation will not make that problem any worse, and in fact will likely improve it for the neighbors to the west, the only ones who have opposed this petition, by moving the helipad 500 feet to the east and thus further away from them.

The operation of the helipad must comply with all applicable federal and local regulations, as specified in the final condition recommended in this report, and a log of flights should be maintained to insure that the helipad continues to be used only for medical necessity. (It is a permitted use only as an “emergency helipad.”) A condition to this effect has also been recommended. In addition, a condition is recommended requiring Petitioner to review the helicopter flight paths and determine which flight paths will minimize disturbance to the surrounding community. To the extent that MGH has control over the flight paths used, it should establish a preference, consistent with safety and operational concerns, for using the flight paths which minimize disturbance to the surrounding

community. If Petitioner does not control the flight paths, then it should consult with the appropriate controlling authority to encourage use of the flight paths which minimize disturbance to the surrounding community, without adversely impacting safety and operational considerations. This condition does not require Petitioner to change any of its operational features if they are needed to insure safety and functionality. It merely requires that, within those parameters, the concerns of the neighbors about noise and vibrations be addressed.

Staff stated that the primary characteristics associated with the proposed modifications are the increase in building density and parking spaces. Yet, Staff concluded that “[t]he proposed modifications are not likely to result in adverse operational characteristics such as noise or traffic to the site.” Exhibit 22, p. 22. Based on Petitioner’s own traffic study, the Hearing Examiner disagrees. Additional traffic is projected for the site. There will also continue to be noise from helicopter operations. Although the evidence is that the number of in-patients will not increase and the increase in staff will be minimal, there will undoubtedly be more patients using the emergency room. Nevertheless, the adverse effects on the community from these changes will be relatively mild. All intersections but one will continue operate within the Olney Policy Area CLV standard, and the traffic increases at the one offending intersection (Georgia Avenue and Old Baltimore Road) will be mitigated to below pre-modification background levels by Petitioner adding a new right-turn lane. The twelve new parking spaces on a large parking lot will have no impact whatever on surrounding properties. The evidence is that helicopter noise will not increase as a result of its relocation, as discussed in Part II. D. of this report.

There appear to be no other non-inherent characteristics of the site, since the MGH has the facilities one might ordinarily expect in a hospital. Therefore, there appear to be no non-inherent characteristics of the site which warrant denial of this modification petition.

## B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

### Sec. 59-G-1.21. General conditions:

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Hospitals (Zoning Code §59-G-2.31) are permitted as special exception uses in the RE-2, R-200 and R-60 Zones by virtue of Zoning Code §59-C-1.31(d), and the use already exists in this case.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: As described in Part IV. C., below, the proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.31.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property lies within the area analyzed by the 2005 Olney Master Plan. The Master Plan does not recommend any changes to existing zoning (RE-2, R-200 and R-60), and the subject use is permissible by special exception in those zones. Since the instant petition concerns modification to a special exception which already exists, the existing hospital is presumed to be in conformity with the Master Plan. Thus, the question is whether expansion of the hospital is also consistent with the Master Plan. That issue is addressed directly in the Master Plan, which provides (p. 17) that it supports MGH as the major employer in Olney, and specifically:

“Future expansion of Montgomery General Hospital should be supported on its main campus as well as on the vacant site across the street from the main campus.”

About the Master Plan, Technical Staff quoted the Community Based Planning staff (Exhibit 22, p. 6):

The 2005 Olney Master Plan recognizes that Montgomery General Hospital is the largest employer in Olney and is a regional attraction in a satellite town whose retail and commercial development remains local in nature. The plan supports expansion of the hospital on its main campus and on vacant land it owns nearby. The proposed additions are located on the main campus.

The proposed modifications are consistent with the Olney Master Plan. This Division recommends approval of the special exception petition, subject to compliance with applicable conditions and requirements.

MGH has been on this site for many years, and nothing proposed in this modification petition would affect its consistency with the Master Plan. The Hearing Examiner agrees with the conclusion of Technical Staff that the application is in conformance with the *Olney Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: On this issue, Technical Staff states that, “[w]ith the recommended conditions, the proposed use will be in harmony with the general character of the neighborhood. The site and landscape plans provide for extensive landscaping, partially attributed to the additional planting that the applicant agreed to plant in the stream buffer area to compensate for intensified intrusion into the stream valley buffer.” Exhibit 22, p.26.

Traffic will be marginally increased by the addition of up to 14 new employees and new users of the outpatient and emergency facilities, but the increases will not adversely affect the transportation network, according to both Technical Staff and Petitioner’s Transportation Planner, Craig Hedberg. Parking on site also will also be only marginally increased, but Technical Staff observed that parking accommodation is in excess of the minimum requirement (69%), and that the location of the hospital (adequately distanced from the residential properties), the presence of a stream and a stream valley buffer on site, and the expansive land area make it is unlikely that the proposed modifications would generate a level of traffic or noise that would raise concern for congestion on the streets or the residential neighborhood. The use has co-existed in harmony with the neighborhood for many years, and the proposed modifications will not change that relationship.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the requested modifications would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, for the reasons

stated in response to the previous general condition. The emergency helipad may not be eliminated because it is a permitted use, although its location and operation may be reviewed. The evidence supports the finding that helicopter noise will not be any worse than presently exists, and might actually improve by relocating the helipad 500 feet to the east.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The subject property has been improved with this hospital since about 1969. Except as already discussed regarding helicopter activities, there is no evidence that the use has caused objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity in the past. The Hearing Examiner finds that the requested modifications will not adversely change those operational characteristics.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The Hearing Examiner concludes that the proposed modifications will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, as stated above, this special exception use is consistent with the recommendations of the applicable Master Plan, and therefore, under the terms of this provision, it does “not alter the nature of an area.” Technical Staff did not report any other special exceptions in the general neighborhood. The modifications to MGH will

not, by dint of number, scope, or intensity, change the predominantly residential character of the neighborhood or alter it adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed modifications would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. The continuation of a hospital that has existed for many years at this location will continue to provide employment and health service to the community, and will have no adverse effect on any of the listed individuals.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(i) *If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review[LATR] and the Policy Area Transportation Review[PATR],<sup>25</sup> as required in the applicable Annual Growth Policy.*

(ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.*

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<sup>25</sup> Policy Area Transportation Review (PATR) standards had been removed by the Council from the Growth Policy effective July 1, 2004; however, a new public facilities test, called Policy Area Mobility Review (PAMR), was included in the Growth Policy amendments adopted by the Council on November 13, 2007. For the reasons discussed at length in Part II.C.4. of this report, the Hearing Examiner concludes that the new Growth Policy should not be applied to this case.



Conclusion: The proposed modifications do not require a preliminary plan of subdivision, and the Board of Appeals must therefore determine the adequacy of public facilities. The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. Public water and sewer serve the site and are adequate. By its nature, the site will require no school services.

A traffic impact study (Exhibit 19(a)) was prepared by Petitioner's transportation planning expert, Craig Hedberg, and reviewed by Transportation Planning Staff. For the reasons discussed at length in Parts II. C. 3 and 4 of this report, the Hearing Examiner finds that the subject modification petition will comply with the applicable Growth Policy standards.

Based on this uncontradicted record, the Hearing Examiner finds that the proposed modifications would have no adverse impact on transportation facilities or safety. Tr. 140

### **C. Specific Standards: Hospitals**

The specific standards for hospitals are found in Zoning Ordinance § 59-G-2.31. The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the proposed modifications would be consistent with these specific standards, as outlined below.

#### **Sec. 59-G-2.31. Hospitals**

*A hospital or sanitarium building may be allowed, upon a finding by the board that such use will not constitute a nuisance because of traffic, noise or number of patients or persons being cared for;*

Conclusion: The hospital already exists, and has been at this site for many years without creating a nuisance. The proposed modifications will add some outpatients and a small amount of additional staff, with a concomitant increase in traffic and parking. There is also noise

generated by helicopters serving the hospital via its helipad, which Petitioner plans to relocate. The evidence is that the relocation of the helipad will not increase noise or vibrations to the neighbors. As discussed previously in this report, the Hearing Examiner finds that the proposed changes will not create a nuisance from any of the enumerated factors.

*that such use will not affect adversely the present character or future development of the surrounding residential community;*

**Conclusion:** The best evidence that the hospital expansion will not be detrimental to development of the surrounding residential community is the Master Plan's support for such an expansion, as previously discussed. It is on a large campus, which insulates it from the residential community, and it promotes development by providing employment and needed hospital services.

*and if the lot, parcel or tract of land on which the buildings to be used by such institution are located conforms to the following minimum requirements; except, that in the C-2 and C-O zones, the minimum area and frontage requirements shall not apply:*

*(1) Minimum area. Total area, 5 acres.*

**Conclusion:** The main campus of MGH, which is the site of the special exception, is 27 acres, thus exceeding the minimum area requirements.

*(2) Minimum frontage. Frontage, 200 feet.*

**Conclusion:** The proposal complies with this requirement. The property has 1,707 feet of frontage along Brooke Farm Drive and 927 feet of frontage along Prince Philip Drive.

*(3) Setback. No portion of a building shall be nearer to the lot line than a distance equal to the height of that portion of the building, where the adjoining or nearest adjacent land is zoned single-family detached residential or is used solely for single-family detached residences, and in all other cases not less than 50 feet from a lot line.*

Conclusion: The proposal satisfies this requirement, as the proposed eastern addition is set back 207 feet from the lot line and the proposed western addition is set back 327 feet from the lot line, while none of the buildings will exceed 73 feet in height.

*(4) Off-street parking. Off-street parking shall be located so as to achieve a maximum of coordination between the proposed development and the surrounding uses and a maximum of safety, convenience and amenity for the residents of neighboring areas. Parking shall be limited to a minimum in the front yard. Subject to prior board approval, a hospital may charge a reasonable fee for the use of off-street parking. Green area shall be located so as to maximize landscaping features, screening for the residents of neighboring areas and to achieve a general effect of openness.*

Conclusion: According to Technical Staff, the proposal provides for sufficient parking spaces for the hospital use and meets the parking requirements. As part of the proposed modifications, the ambulance bays and the pedestrian entrance to the Emergency Department will be relocated to allow for a better circulation and decreased congestion for ambulance traffic. Parking spaces would be added in some places and will be removed from others in order to accommodate the new addition and protect the stream valley buffer. There will be a net addition of 12 parking spaces, with a total of 1,181 spaces. With the proposed modifications, a total of 697 spaces are required for the hospital.

*(5) Commission recommendation. The board or the applicant shall request a recommendation from the commission with respect to a site plan, submitted by the applicant, achieving and conforming to the objectives and requirements of this subsection for off-street parking and green area.*

Conclusion: The site plan has been reviewed by Technical Staff, and modified in accordance with their suggestions as to both parking and green areas. The revised plans were thereafter approved by the Planning Board.

*(6) Building height limit. Building height limit, 145 feet.*

**Conclusion:** The Building height for the proposed modification is well within the 145 feet maximum height. The tallest of the buildings will measure no more than 73 feet, including the elevator tower.

*(7) Prerequisite. A resolution by the health services planning board approving the establishment of the hospital shall be filed with the petition for a special exception.*

**Conclusion:** The hospital already exists, and has been at this site for many years. This provision is therefore inapplicable to this modification petition.

#### **D. General Development Standards §59-G-1.23**

**(a) Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

**Conclusion:** In addition to the other general and specific standards set forth above, “*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, RE-2, in which Zone the Main Campus is located] except when the standard is specified in Section G-1.23 or in Section G-2.*” The following table was provided by Technical Staff demonstrating compliance with applicable development standards (Exhibit 22, p. 16):

<b>Development Standard</b>	<b>Required (current)</b>	<b>Proposed/Existing</b>
Minimum Lot Area 59-G-2.31 (1)	5 acres	27.19 ac. (SE site) 17 ac other parcels-
Minimum lot Frontage 59-G-2.31 (2))	200 ft	927.10 ft
Building Setback:	A distance equal to the height of that	Eastern Addition: 207 ft

59-G-2.31 (3)	portion of the building, where the adjacent land is zoned single-family detached residential or is used solely for single-family detached residences, and in all other cases not less than 50 feet from a lot line. In this case, the tallest building height is 73 feet, which defines the minimum setbacks	Western Addition: 327 ft
Building coverage	25% (10.5% current))	11.1%
Maximum Building Height 59-G-2.31 (6)	145 SF	Eastern Addition: 25.5 ft Western addition: 42 ft (73 ft to top of elevation cores)

**(b) Parking requirements.** *Special exceptions are subject to all relevant requirements of Article 59-E.*

**Conclusion:** The Pursuant to Section 59-E-3.7, the parking requirements for a hospital are: One parking space for each 1,000 square feet of total floor area, plus one space for each resident doctor, plus adequate reserved space for visiting staff doctors, plus one space for each 3 employees on the major shift. The application proposes a total of 1,181 spaces and has provided the following breakdown of the parking spaces for the various uses in the Hospital:

1sp/ 1,000 SF floor area= 514,650 SF/1,000=	515 sp
1sp/resident doctor=1sp/15 doc=	15 sp
Reserved sp for visiting Staff doctor=	17sp
1 sp/3 employees      450 employees/3	<u>150 sp</u>
Total spaces required	697 sp

**Total spaces provided                      1181 (1,169 existing)**

Technical Staff reports that sufficient parking accommodation is provided to satisfy the Hospital's parking needs. Moreover, the parking facility meets all applicable setback, screening, access, circulation and minimum landscaping requirements.

Exhibit 22, p. 17.

- c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

Conclusion: Not applicable.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: The special exception site is exempt from a forest conservation plan. However, as noted in the Environmental Planning Section Memorandum of September 17, 2007, Environmental Planning staff has worked extensively with the applicant to resolve the issue of site imperviousness, to preserve the remnants of the undeveloped buffer areas on the site, and to reverse past environmental impacts where possible. The applicant and Environmental Planning staff reached consensus on a number of mitigation measures to compensate for exceeding the 10% imperviousness guidelines and for existing and proposed encroachment into the environmental buffer. Environmental issues are discussed at length in Part II.C.6 of this report.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Petitioner's stormwater management plan concept has been approved by DPS  
(Exhibit 36).

**(f) Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: No new signs are proposed.

**(g) Building compatibility in residential zones.**

*Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: Some improvements on the property date back to the 1960's. The proposed modification complements the existing structures in terms of scale, massing, design and function. Compatibility is discussed at length in Part II. C. 1 of this report.

**h. Lighting in residential zones**

*All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The revised photometric study (Exhibit f) demonstrates Petitioner's compliance with this requirement, as discussed in Part II. C. 5. of this report.

**59-G-1.26. Exterior appearance in residential zones.**

*A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and*

*must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.*

Conclusion: The proposed modification complements the existing structures in terms of scale, massing, design and function. Compatibility is discussed at length in Part II. C. 1 of this report.

In sum, it is clear from the record that the proposed modifications will not change the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. The Hearing Examiner must therefore recommend that the Board of Appeals grant the modification petition, with the conditions suggested in the final section of this report.

## **V. RECOMMENDATION**

Based on the foregoing analysis and a thorough review of the entire record, I recommend that Petition No. CBA-2521-I, for modification of the existing special exception held by Montgomery General Hospital, Inc., and located at 18101 Prince Phillip Drive, Olney, Maryland, to permit an expansion and upgrading of hospital facilities, and to add up to 14 employees, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception remain in full force and effect, except as modified in the Board's order granting this modification request.
3. The number of permitted employees may be increased by up to 14 new staff to accommodate the expanded emergency room services.



4. Petitioner's hours of operation are 24 hours per day, seven days a week. These hours are unchanged by the instant modification.
5. All existing and proposed trees and shrubs must be maintained as depicted on the revised landscape plan (Exhibit 45(d) and (e)).
6. Petitioner must plant all unforested and non-impervious areas of the stream valley buffer in accordance with the Environmental Enhancement Plan (Exhibit 23(d)), submitted to Environmental Planning Staff on September 19, 2007.
7. Petitioner must place all existing forest and all areas to be planted in forest within the stream buffer, within a Category 1 conservation easement, except for that portion which will be impervious for location of the helipad; create forest on all remaining open areas of the stream valley buffer (approximately 1.55 acres), with suitable native species; apply enhanced SWM and BMP's per the "non-conformance" criteria in Chapter VII (page 50 & 52) of the Environmental Guidelines (*Guidelines for Environmental Management of Development in Montgomery County*) to the entire site; and no new parking in stream buffer/conservation easement areas.
8. Petitioner must limit expansion related to this special exception modification request at the hospital to no more than 82,250 square feet of additional gross floor area.
9. Petitioner must obtain permits from appropriate agencies and post bond to improve the westbound Old Baltimore Road approach to Georgia Avenue (MD 97) by providing a separate right turn lane prior to the release of any building permit for the expansion.
10. Petitioner must provide the following lead-in sidewalks from Prince Philip Drive and Old Baltimore Road to the various hospital buildings:

- From Prince Philip Drive:
  - i. Along the north side of the main hospital driveway connecting to the existing Medical and Professional Office Buildings and the proposed new west addition.
  - ii. Along the north side of the northern hospital driveway connecting to the existing connecting walkway through the parking lot in front of the existing Professional Office Building.
- From Old Baltimore Road:

Along the hospital driveway connecting to the existing sidewalk along the east side parking lot (in front of the existing Oncology Building).

The above sidewalks must be shown on the approved special exception site plan and must be constructed prior to occupancy of the proposed additions.

11. Petitioner must provide a minimum of ten (10) bike lockers for employees and four (4) bike racks for visitors at the hospital. The bike lockers and bike racks must be shown on the approved special exception site plan and must be constructed prior to occupancy of the proposed additions.
12. Any temporary construction signs must comply with all applicable requirements of Article 59-F. All signs placed on the property must meet the requirements of Section 59-F-4.2 (a) in terms of number, location and area and Section 59-F-4.1 (e) regarding illumination.
13. If the specifications for the proposed helipad change materially, including its orientation, Petitioner will timely file a revised Site Plan with the Board of Appeals indicating any changes to the helipad.
14. Petitioner should maintain a log of helicopter flights to and from the hospital to insure that it is being used only for emergency purposes, which is the basis for its permitted use status under Zoning Ordinance §59-A-6.6. “Emergency” in this context should be broadly construed to include all flights deemed medically necessary for individual

patients. The log should indicate at least the date and time of flight, the destination and origination points, the operator of the helicopter, and the reason for the flight (Patient names should not be included to protect privacy rights). The log should be made available for review by the Department of Permitting Services upon request.

15. Petitioner should review the helicopter flight paths and determine which flight paths will minimize disturbance to the surrounding community. To the extent that MGH has control over the flight paths used, it should establish a preference, consistent with safety and operational concerns, for using the flight paths which minimize disturbance to the surrounding community. If Petitioner does not control the flight paths, then it should consult with the appropriate controlling authority to encourage use of the flight paths which minimize disturbance to the surrounding community, without adversely impacting safety and operational considerations. The results of Petitioner's review should be submitted to the Board within six months after the relocated helipad becomes operational.
16. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: December 21, 2007

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner